SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965

No. 147

GEORGIA, PETITIONER,

vs.

THOMAS RACHEL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the Northern District of Georgia, Atlanta Division		
Petition for removal	2	2
Order remanding case, dated February 18, 1964	10	5
Notice of appeal	16	9
Clerk's certificate (omitted in printing)	17	9
Motion to dismiss appeal filed in the U.S.C.A. for the Fifth Circuit	18	10
Per curiam order of the Court of Appeals staying order of remand of District Court dated February 18, 1964	23	13
Dissenting, Carswell, J.	24	14
Designation of record on appeal	25	15
Statement of points	26	15
Cross-designation of record on appeal	28	16
Statement of points to be relied upon by appellee	29	17
Proceedings in the United States Court of Appeals for the Fifth Circuit	33	19
Minute entry of argument and submission	33	19

RECORD PRESS, PRINTERS, NEW YORK, N. Y., OCTOBER 29, 1965

	Original	Print
Opinion, Tuttle, Ch. J.	34	20
Opinion concurring in part and dissenting in part, Bell, J.	49	32
Opinion concurring in part and dissenting in part, Whitehurst, J.	53	35
Judgment	54	36
Petition for rehearing en banc	55	37
Per curiam order denying petition for rehearing	71	51
Opinion concurring in part and dissenting in part, Bell, J.	72	51
Dissenting opinion, Whitehurst, J.	72	51
Per curiam opinion	72	51
Clerk's certificate (omitted in printing)	73	51
Order allowing certiorari	74	52

[fol. 2]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

THE STATE OF GEORGIA,

versus No. 23869

THOMAS RACHEL, JERRY WALKER, LARRY CRAWFORD FOX, DEBBIE AMIS, WILLIE PAUL BERRIEN JR., LYNN PFUHL, MICHAEL SAYER, JULIAN M. SAMSTEIN, RALPH M. MOORE, RONALD FRANKLIN TURNER, CARL C. ARNOLD, JAMES F. THOMPSON, ARCHER COLUMBUS BLACK, CARL VINCENT HILL, JEANETTE STOCKTON HUME, JAMES ARTHUR CHERRY, RUSSELL C. CAMPBELL, ALLEN R. ELLIOTT, ANNA JO WEAVER, and CHARLES EDWARD WELLS.

PETITION FOR REMOVAL—Filed: February 17, 1964

To the Judges of the United States District Court for the Northern District of Georgia, Atlanta Division:

1. The above-named petitioners are presently at liberty on bail and are charged with violating Title 26, Georgia Code Annotated, Section 3005. Petitioners were arrested by members of the Police Department of the City of Atlanta, and their arrests were effected for the sole purpose of aiding, abetting, and perpetuating customs, and usages which have deep historical and psychological roots in the mores and attitudes which exist within the City of Atlanta with re-
[fol. 3] spect to serving and seating members of the Negro race in such places of public accommodation and convenience upon a racially discriminatory basis and upon terms and conditions not imposed upon members of the so-called white or Caucasian race. Members of the so-called white

or Caucasian race are similarly treated and discriminated against when accompanied by members of the Negro race.

The petitioners, Thomas Rachel, Jerry Walker, Larry Crawford Fox, Debbie Amis, Willie Paul Berrien, Jr., Lynn Pfuhl, Michael Sayer, and Julius M. Samstein, were arrested on June 17, 1963 when they sought to obtain service, food, entertainment, and comfort at Lebco, Inc., d/b/a Leb's, a privately owned restaurant opened to the general public, 66 Luckie Street, Atlanta, Fulton County, Georgia.

The following-named petitioners were arrested at Lebco, Inc., d/b/a Leb's, a restaurant owned and operated, as aforesaid, and charged by special presentment of the July-August, 1963 Term Grand Jury of Fulton County, Georgia, with violating the above-mentioned statute:

(a) Ralph M. Moore, May 18, 1963
(b) Ronald Franklin Turner, May 18, 1963;
(c) Carl C. Arnold, June 8, 1963;
(d) Julius M. Samstein, June 7, 1963;
(e) James F. Thompson, June 8, 1963;
(f) Archer Columbus Black, June 8, 1963;
(g) Carl Vincent Hill, May 3, 1963;
(h) Jeanette Stockton Hume, May 4, 1963.

[fol. 4] The petitioners, James Arthur Cherry, Julius M. Samstein, and Willie Paul Berrien, Jr., were arrested on May 4, 1963 when they sought to obtain service, food, entertainment, and comfort at Davis House No. 3, Inc., d/b/a Davis Fine Food Cafeteria, a privately owned cafeteria-styled restaurant opened to the general public, on Marietta Street, Atlanta, Fulton County, Georgia.

Additionally, the following named petitioners were arrested at Davis House No. 3, Inc., d/b/a Davis Fine Food Cafeteria, a cafeteria-styled restaurant owned and operated, as aforesaid, and charged by special presentment of the July-August, 1963 Term, Grand Jury of Fulton County, Georgia, with violating the above-mentioned statute:

(a) Ralph M. Moore, May 1, 1963;
(b) Willie Paul Berrien, May 1, 1963;
(c) Willie Paul Berrien, June 6, 1963.

Petitioners, Anna Jo Weaver, Russell C. Campbell, and Allen Elliott, were arrested on April 30, 1963, when they sought to obtain service, food, entertainment, and comfort at the Ship Ahoy, Inc., a privately owned restaurant opened to the general public, located on Luckie Street, Atlanta, Fulton County, Georgia and charged by special presentment of the July-August, 1963 Term of the Fulton County Grand Jury with violating the above-mentioned statute.

The Petitioner, Carl C. Arnold, was arrested at the Ship Ahoy on May 23, 1963.
[fol. 5] Petitioner, Carl C. Arnold was arrested on May 1, 1963, and petitioner, Charles Edward Wells on May 1, 1963, and petitioner, Charles Edward Wells on May 4, 1963, when petitioners sought to obtain service, food, entertainment, and comfort at Davis Brothers, Incorporated, a privately owned restaurant opened to the general public, located on Luckie Street, Atlanta, Fulton County, Georgia, and charged by special presentment of the July-August, 1963 Term of the Fulton County Grand Jury with violating the aforementioned statute.

Petitioner, Willie Paul Berrien, Jr., was arrested on March 13, 1963 when he sought lodging, food, service, entertainment and comfort at the H. & G. Hotel Corporation, d/b/a Henry Grady Hotel, a hotel facility opened to the general public built on real estate owned by the State of Georgia but leased for a term of years to the H. & G. Hotel Corporation, located in Atlanta, Fulton County, Georgia, and charged by special presentment of the July-August, 1963, Term of the Fulton County Grand Jury with violating the aforementioned statute.

2. Subsequent to the petitioners' arrest, as aforesaid, the July-August, 1963 Term of the Fulton County Grand Jury returned special presentments against the petitioners charging them with violating Title 26, Georgia Code An-

notated, Section 3005, as aforesaid. The cases of the State of George vs. Thomas Rachel, et al., growing out of the aforesaid arrests and special presentments, are presently pending in the Superior Court of Fulton County, Georgia, to be heard during the week of February 17th through 22nd, 1964, the first case to be called for trial at 9:30 A. M. February 17, 1964.

[fol. 6] 3. By virtue of Title 28, United States Code Annotated, Section 1443(1) and (2), this Court has jurisdiction to hear and try the charges now pending against the petitioners. Removal is sought to protect the rights guaranteed the petitioners under the due process and equal protection clauses of Section 1, Fourteenth Amendment of the Constitution of the United States and to protect the right of free speech, association, and assembly guaranteed by the First Amendment of the Constitution of the United States.

Moreover, petitioners are being prosecuted for acts done under color of authority derived from the constitution and laws of the United States and for refusing to do an act which was, and is, inconsistent with the Constitution and Laws of the United States.

4. The petitioners are denied and/or cannot enforce in the Courts of the State of Georgia rights under the Constitution and Laws of the United States providing for the equal rights of citizens of the United States and all persons within the jurisdiction thereof, in that, among other things, the State of Georgia by statute, custom, usage, and practice supports and maintains a policy of racial discrimination.

5. Bond with good and sufficient surety is not required to be filed herewith, since the cases pending against the petitioners are criminal.

Further, since the petitioners are at liberty on bond, this Court is not required to issue its writ of habeas corpus to bring the petitioners before the Court.

[fol. 7] Wherefore, in view of these facts, petitioners pray that the aforesaid criminal proceedings may be removed

from the Superior Court of Fulton County to the United States District Court for the Northern District of Georgia, Atlanta Division, for trial and pray that said prosecution stand so removed as provided for in Title 28, United States Code Annotated, Section 1446 (c) and (d).

Donald L. Hollowell, Attorneys for Petitioners.

P. O. Address: 859½ Hunter St., N.W., Atlanta, Georgia 30314, 525-8372.

Duly sworn to by Howard Moore, Jr., jurat omitted in printing.

[fol. 9] Certificate of Service (omitted in printing).

[fol. 10]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA,

ATLANTA DIVISION

Criminal No. 23,869

[Title omitted]

ORDER REMANDING CASE—February 18, 1964

In a petition for removal verified by counsel, filed in this Court on February 17, 1964, by the above named defendants, the petitioners allege:

That they are presently at liberty on bail on a charge of having violated Title 26, Georgia Code Annotated, § 3005; that they were arrested by members of the Police Department of the City of Atlanta and that "their arrests were effected for the sole purpose of aiding, abetting, and perpetuating customs, and usages which have deep historical [fol. 11] and psychological roots in the mores and attitudes which exist in the City of Atlanta with respect to serving and seating members of the Negro race in such places of public accommodation and convenience upon a racially

discriminatory basis and upon terms and conditions not imposed upon members of the so-called white or Caucasian race. Members of the so-called white or Caucasian race are similarly treated and discriminated against when accompanied by members of the Negro race."

It is alleged that petitioner, William Paul Berrien, Jr., was arrested "when he sought lodging, food, service, entertainment and comfort at the H & G Corporation d/b/a Henry Grady Hotel" which is alleged to be a hotel facility open to the general public, built on real estate owned by the State of Georgia, but leased to said corporation. It is alleged that the other petitioners were arrested at specified privately owned restaurants and cafeterias in the City of Atlanta, all of the arrests being on specified dates in 1963 and it being alleged that all of petitioners were indicted by the July-August, 1963, Grand Jury of Fulton County, Georgia, for violation of said statute; that the cases are presently pending in the Superior Court of Fulton County, Georgia, and are set to be heard during the week of February 17 to February 22, 1964, "the first case to be called for trial at 9:30 A. M. on February 17, 1964."

Petitioners allege that this Court has jurisdiction to hear and try the charges presently pending against them by virtue of 28 United States Code Annotated § 1443(1) (2); That removal is sought to protect rights guaranteed to peti- [fol. 12] tioners under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and to protect the right of free speech, association, and assembly guaranteed by the First Amendment to the Constitution of the United States; that "petitioners are prosecuted for acts done under color of authority from the constitution and laws of the United States and for refraining to do an act which was, and is, inconsistent with the Constitution and Laws of the United States;" that they are denied and/or cannot enforce in the courts of the State of Georgia the specified rights claimed under the Constitution and laws of the United States, "in that, among other things, the State of Georgia by statute, custom, usage, and practice maintains a policy

of racial discrimination." Petitioners pray for removal of said criminal proceedings from the state court to this court for trial and "that said prosecutions stand so removed as provided for in Title 28, United States Code Annotated, Sec. 1446(c) (d)."

The criminal statute under which these movant defendants are indicted is § 26-3005 of the Georgia Code, which reads, as follows:

> "Refusal to leave premises of another when ordered to do so by owner or person in charge. It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or [fol. 13] such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor."

The defendants do not here contend that this statute is unconstitutional. The Supreme Court of Georgia has recently held that this statute does not violate the due process clause of the federal constitution. (1)

It is the duty of the district court to examine on its own motion the question of whether a case removed to it should be remanded to the state court without waiting for a motion to remand. (2.)

The removal statute—§ 1443, Title 28, U. S. C.—is to be strictly construed. (3.)

A criminal prosecution or a civil cause under this statute [28 U. S. C. § 1443] because of a civil right or the enforcement of such right must arise out of the destruction of such right by the Constitution or statutory laws of the State wherein the action is pending. The

1. Clark v. State of Georgia (28971), Supreme Court of Georgia—Case No. 22,323, decided Jan. 30, 1964.

2. In Re MacNeil Bros. Co. (CCA Mass. 1958) 259 F. 2d 386; Westark Production Credit Ass'n v. Fidelity & Deposit Co., (D.C. W.D. Ark. 1951) 100 F. Supp. 52, 56; Rand v. State of Arkansas (D.C. W.D. Ark. 1961) 191 [fol. 14] F. Supp. 20; Title 28, § 1447(c), U. S. C.

3. Shamrock Oil Corp. v. Sheets, 313 U. S. 100; City of Birmingham, Ala. v. Croskey, 217 F. Supp. 947.

statute does not justify federal interference where a party is deprived of any civil right by reason of discrimination or illegal acts of individuals or judicial or administrative officers. If the alleged wrongs are permitted by officers or individuals the remedy is the prosecution of the case to the highest court of the State and then to the Supreme Court of the United States as the laws of the United States authorize. The statute contemplates that during the trial of a particular case, the state court will respect and enforce the right of the defendant to the equal protection of the laws of the State or the constitutional laws of the United States. (4.)

The duty to enforce and protect every right granted and secured by the United States Constitution rests equally upon State and Federal Courts. (5.)

Considered in the light of the aforementioned authority, the petition for removal to this Court does not allege facts sufficient to justify the removal that has been effected.

Since the case was improperly removed to this Court, it is the duty of this Court to remand the same to the Superior Court of Fulton County, Georgia, § 1447(c), Title 28, U. S. C. and the defendants named in the above styled case are hereby required to report without delay to the [fol. 15] Superior Court of Fulton County, Georgia, and there attend from day to day thereafter as may be ordered by said Superior Court.

4. Hull v. Jackson County Circuit Court, (CCA Mich. 1943) 138 F. 2d 820; Rand v. State of Arkansas, supra, note 1; City of Birmingham, Ala. v. Croskey, supra, note 2;

People of State of California v. Lamson, 12 F. Supp. 813; 2 Cyc. of Fed. Procedure, Sec. 3.82.

5. Gibson v. State of Mississippi, 162 U. S. 565, 40 L. Ed. 1075; Ex Parte Royall, 117 U. S. 241, 248, 29 L. Ed. 868 at p. 870; Snypp v. State of Ohio, 70 F. 2d 535.

It is therefore Ordered, Adjudged and Decreed that the above styled case is hereby remanded to the Superior Court of Fulton County, Atlanta, Georgia.

This the 18th day of February, 1964.

Boyd Sloan, United States District Judge.

[fol. 16]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA,

ATLANTA DIVISION

Criminal No. 23,869

[Title omitted]

NOTICE OF APPEAL—Filed: March 5, 1964

Notice is hereby given that Thomas Rachel, et al., plaintiffs in the above-stated case, hereby appeal to the United States Court of Appeals for the Fifth Circuit from the Order of the United States District Court for the Northern District of Georgia, Atlanta Division, of February 18, 1964, dismissing their removal petition sua sponte. Said order was entered February 18, 1964.

Donald L. Hollowell, Howard Moore, Jr., Attorneys for Appellants.

[fol. 17] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 18]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 23,869 Criminal

21354

THOMAS RACHEL, JERRY WALKER, LARRY CRAWFORD FOX, DEBBIE AMIS, WILLIE PAUL BERRIEN, JR., LYNN PFUHL, MICHAEL SAYER, JULIAN M. SAMSTEIN, RALPH M. MOORE, RONALD FRANKLIN TURNER, CARL C. ARNOLD, JAMES F. THOMPSON, ARCHER COLUMBUS BLACK, CARL VINCENT HILL, JEANETTE STOCKTON HUME, JAMES ARTHUR CHERRY, RUSSELL C. CAMPBELL, ALLEN R. ELLIOTT, ANNA JO WEAVER, and CHARLES EDWARD WELLS,

VS.

THE STATE OF GEORGIA.

MOTION TO DISMISS APPEAL—Filed March 12, 1964

Statement of the Case

On February 17, 1964, the above named defendants in a number of criminal cases then pending in Fulton Superior Court, Fulton County, Georgia, charging violations of Section 26-3005 of the Code of Georgia filed a petition for removal verified by counsel, relying upon Section 1443 (1) (2) Title 28, United States Code.

On February 18, 1964, Honorable Boyd Sloan, United States District Judge for the Northern District of Georgia, issued an opinion and order remanding all of said cases to the Superior Court of Fulton County, Atlanta, Georgia.

On March 5, 1964, petitioners filed a notice of appeal to this Court from the Order of Judge Boyd Sloan remanding said cases sua sponte.

Petitioners have now filed a motion for a stay of the proceedings in Fulton County Superior Court pending said Appeal from the Order remanding the cases for trial in the Fulton Superior Court.

[fol. 19] The State of Georgia moves to dismiss said Appeal on the following grounds:

1.

The notice of Appeal from the Order of February 18, 1964, remanding the cases was not timely filed, having been filed more than ten days from the date of said Order.

2.

The said Order of Judge Boyd Sloan remanding said cases to the State Court for trial is not reviewable by this Court on appeal or otherwise.

The State of Georgia also urges this Court to deny a stay of proceedings in the Fulton Superior Court because the Order of Remand is not appealable.

Argument and Authorities

This brief will be necessarily very sketchy since counsel for the State of Georgia has had less than twenty-four hours notice of the hearing before this Honorable Court. However, Section 1447, Title 28 United States Code reads in part as follows:

> "(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. June 25, 1948, c. 646, 62 Stat. 939, amended May 24, 1949, c. 139, Sect. 84, 63 Stat. 102."

In the limited time available, counsel for the State of Georgia has not been able to find any reported federal case holding contrary to the last quoted section. There are many federal decisions, however, holding that an Order of Remand to a State Court is not appealable. For example, in the case of *Aetna Casualty & Surety Co. et al.* v. *Flowers,*

1946, 330 U.S. 464, the United States Supreme Court [fol. 20] stated the following:

> "An order of a District Court remanding a cause to the state court from whence it came is not appealable, and hence may not be reviewed either in the Circuit Court of Appeals or here."

Other recent federal decisions holding to the same effect are: Kromer v. McNabb, 10 Cir., 1962, 308 F.2nd 863; Hirsch v. Bruchhausen, 2 Cir., 1960, 284 F.2d 783; In Re Bear River Drainage District, 10 Cir., 1959, 267 F. 2d 849; and F & L Drug Corp. v. American Cent. Ins. Co., D C Conn. 1961, 200 F. Supp. 718.

It is also earnestly insisted by the State of Georgia that this notice of appeal was filed too late. These are criminal proceedings in the Georgia Court and have been removed to Federal Court as a criminal case and have been given a criminal number in the United States District Court. Therefore, the notice of appeal from the Order of Judge Sloan remanding the cases should have been filed within ten days from the date of his Order of February 18, 1964, pursuant to Rule 37 (a) (2) Federal Rules of Criminal Procedure. The cases were properly remanded to Fulton Superior Court. The State of Georgia also respectfully insists that the cases were properly remanded to the Fulton Superior Court for trial for the reasons set out by Judge Sloan in his five page opinion. The State of Georgia relies upon the authority cited by Honorable Boyd Sloan and will not repeat those authorities here for lack of time.

Wherefore, the State of Georgia prays:

1.

That the appeal of said petitioners from the Order of Remand be dismissed.

[fol. 21] 2.

That the stay requested by petitioners be denied.

3.

That the State of Georgia be permitted to file an original and four typewritten copies of this motion in lieu of having been printed because of want of time in which to have this motion printed pursuant to the rules of this Court.

Respectfully submitted,

William T. Boyd, Solicitor General, Atlanta Judicial Circuit, J. Robert Sparks, Assistant Solicitor General, A. J. C.

[fol. 22] Certificate of Service (omitted in printing).

[File endorsement omitted]

[fol. 23]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21354

THOMAS RACHEL, *et al.*, Appellants,

v.

THE STATE OF GEORGIA, Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before Tuttle, Chief Judge, Wisdom, Circuit Judge, and Carswell, District Judge.

PER CURIAM ORDER STAYING ORDER OF REMAND OF DISTRICT COURT DATED FEBRUARY 18, 1964—March 12, 1964

This Court having heretofore, in the case of Congress of Racial Equality v. City of Clinton, Louisiana, granted a stay of the order of remand returning the said case to the

state courts of Louisiana, pending an appeal from such order of remand on the merits, we conclude that consistent with that order a stay should be granted to the appellants here.

The question of the appealability of an order of remand is presented in the C.O.R.E. case which will be promptly heard by this Court. We conclude that the effectiveness of the order of the District Court, dated February 18, 1964, remanding these cases to the Superior Court of Fulton County should be delayed pending a determination of the appeal on the merits.

[fol. 24] It is, therefore, Ordered that the said order of February 18, 1964, be and the same is hereby stayed pending final disposition of this appeal on the merits or the earlier order of this Court.

This 12th day of March, 1964.

Elbert P. Tuttle, United States Circuit Judge, John Minor Wisdom, United States Circuit Judge.

CARSWELL, District Judge, Dissenting:

Orders of remand are not appealable under the affirmative language of the statute, nor have the courts before this held them so to be. The nature of the particular case does not, in my view, afford legally sufficient cause to disturb this universally applied rule.

I would, therefore, grant appellee's motion to dismiss this appeal.

This 12th day of March, 1964.

G. Harrold Carswell, United States District Judge, Northern District of Florida.

[File endorsement omitted]

[fol. 25]

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA,

ATLANTA DIVISION

No. 23,869

[Title omitted]

DESIGNATION OF RECORD ON APPEAL—Filed April 6, 1964

Pursuant to Rule 75(a) of the Federal Rules of Civil Procedure, the defendants-appellants hereby designate for inclusion in the record on appeal to the United States Court of Appeals for the Fifth Circuit, taken by Notice of Appeal filed March 5, 1964, the following portions of the record and proceedings in the action:

1. Notice of Appeal filed March 5, 1964.
2. Verified Removal Petition filed February 17, 1964.
3. Order of Remand filed February 18, 1964.
4. Motion for Stay Pending Appeal filed March 12, 1964.

[fol. 26] 5. Per Curiam Order of the United States Court of Appeals for the Fifth Circuit staying effect of the Order of Remand.

6. This designation.

This 6th day of April, 1964.

Donald L. Hollowell, Howard Moore, Jr., Attorneys for Appellants.

IN UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA,

ATLANTA DIVISION

STATEMENT OF POINTS—April 6, 1964

The following constitute the points on which the appellants here will rely on appeal:

1. Mode of proceeding and time of filing notice of appeal from a remand order issued sua sponte and without hearing is governed by Rule 73 (a) and (b) of the Federal Rules of Civil Procedure.

2. Title 28, United States Code Annotated, Section 1447 (d), is not applicable to an appeal taken from a remand order issued sua sponte on a verified removal petition [fol. 27] upon a determination that the petition for removal failed to state a removal cause under Title 28, United States Code Annotated, Section 1443 (1) and (2).

3. Title 28, United States Code Annotated, Section 1447 (d), is not a bar to an appeal taken from a remand order in proceedings removed to the United States District Court pursuant to Title 28, United States Code Annotated, Section 1443 (1) and (2).

4. The petition for removal made a short and plain statement of facts sufficient to state a cause cognizable under Title 28, United States Code Annotated, Section 1443 (1) and (2).

5. The Court below erred in remanding the cases without first holding a hearing to ascertain the validity of the factual allegations.

This 6th day of April, 1964.

Donald L. Hollowell, Howard Moore, Jr., Attorneys for Appellants.

[fol. 28]

IN UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA,

ATLANTA DIVISION

CROSS-DESIGNATION OF RECORD ON APPEAL—
Filed April 8, 1964

The State of Georgia, Appellee, hereby designates for inclusion in the record on appeal to the United States

Court of Appeals for the Fifth Circuit, to-wit No. 21354, the following portions of the record and proceedings:

1. Copy of Motion to Dismiss Appeal, the original of which was filed in the United States Court of Appeals for the Fifth Circuit on March 12, 1964, and a copy of which is on file with the Clerk of this Court.
2. This Cross-Designation of Contents of Record on Appeal.
3. All portions of the record previously designated by the Designation of Record on Appeal filed by Appellants on April 6, 1964.

[fol. 29] This 8th day of April, 1964.

William T. Boyd, Solicitor General, A.J.C., J. Robert Sparks, Asst. Sol. Gen., A.J.C., Attorneys for Appellee.

Third Floor Courthouse, Atlanta, Georgia 30303, JA 2-5310.

IN UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF GEORGIA,

ATLANTA DIVISION

STATEMENT OF POINTS TO BE RELIED UPON BY APPELLEE ON APPEAL

The State of Georgia, Appellee, will rely upon the following points on appeal before the United States Court of Appeals for the Fifth Circuit in the above captioned case:

1.

On the merits of the Appeal of United States District Judge Boyd Sloan's Order of February 18, 1964, remanding the above case to the Superior Court of Fulton County,

[fol. 30] Georgia, the Petition of Removal dated February 17, 1964, does not setout legally sufficient cause to justify the removal of these State Court criminal prosecutions to Federal Court.

2.

Said Petition for Removal filed February 17, 1964, is legally insufficient in that it did not have attached thereto a copy of each indictment sought to be removed as to each of said twenty (20) defendants, and such copy has not yet been filed as of this date in the United States District Court for the Northern District of Georgia as provided in Section 1446, Title 28 U.S.C.

3.

On the Motion to Dismiss Appeal heretofore filed by Appellee with the Fifth Circuit Court of Appeals on March 12, 1964, a copy of which is on file in the office of this Court, said appeal should be dismissed because the Notice of Appeal from the Remand Order of District Judge Boyd Sloan dated February 18, 1964, was not timely filed, having been filed more than ten (10) days from the date of said Order, to wit, on March 5, 1964, no extension of time having been granted by the District Court for filing a Notice of Appeal, and that the permissible time in which a Notice of Appeal can be filed is governed by Rule 37 (a) (2), Federal Rules of Criminal Procedure, said case being a criminal action.

[fol. 31] 4.

Aforesaid Motion to Dismiss Appeal should be granted because the aforesaid Remand Order of District Judge Boyd Sloan dated February 18, 1964, is not reviewable on appeal or otherwise pursuant to Section 1447 (d), Title 28, U.S.C.

5.

Even if the process of removing the above criminal case from State to Federal Court be construed as a civil action, *ad arguendo* as contended by Appellants, the appeal should

be dismissed because the Appellants have not complied with the requirement of Section 1446 (d), Title 28, U.S.C., which requires that every Petition for Removal of civil action shall be accompanied by a bond with good and sufficient surety for the payment of costs, and the record in the United States District Court does not show that any such bond has been posted for any defendant named in the Petition for Removal.

6.

The Remand Order of District Judge Boyd Sloan was correct as a matter of law and there was no necessity nor requirement for said Court to hold a hearing to ascertain the validity of the factual allegations.

[fol. 32] This 8th day of April, 1964.

William T. Boyd, Solicitor General, A.J.C., J. Robert Sparks, Asst. Sol. Gen., A.J.C., Attorneys for Appellee.

[fol. 33]

IN UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

THOMAS RACHEL, *et al.*,

No. 21354 versus

THE STATE OF GEORGIA.

MINUTE ENTRY OF ARGUMENT AND SUBMISSION—
October 2, 1964

On this day this cause was called, and after argument by Anthony G. Amsterdam, Esq., for Appellants, and by J. Robert Sparks, Esq., Asst. Solicitor General of Georgia, and Albert Sidney Johnson, Esq., Asst. Attorney General of Georgia, for Appellees, was submitted to the Court.

[fol. 34]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
No. 21354

THOMAS RACHEL, *et al.*, Appellants,

versus

STATE OF GEORGIA, Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

OPINION—March 5, 1965

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and WHITEHURST, District Judge.

TUTTLE, Chief Judge: This is an appeal by the named appellant and 19 other persons charged with the violation of Georgia's so-called anti-trespass statute, Title 26 Georgia Code Annotated, Section 3005, from an order entered by the district court without a hearing remanding the cases for trial to the state court after they had been removed [fol. 35] by a petition for removal filed pursuant to Title 28 U.S.C.A. §1443(1) and (2) (the Civil Rights Removal Sections). Having held, in the case of *Congress of Racial Equality, et al.* v. *Town of Clinton, Parish of East Feliciana*, 5 Cir., 1964, —— F. 2d ——, that the enactment of the Civil Rights Act of 1964 resolved the question of appealability of remand orders as to cases removed to the Federal

District Courts under Section 1443, *supra*,[1] we turn directly to the merits of the appeal.[2]

[fol. 36] The question to be resolved on the merits of the appeal is whether the petition for removal in this case adequately stated a basis for removal under the indicated sec-

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[1] Prior to the enactment of Section 901 of the Civil Rights Act of 1964, Title 28 U.S.C.A. §1447(b) on its face seemed to prohibit an appeal from an order of remand. It provided: "an order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise." Notwithstanding the provisions of that statute, however, a substantial question had been raised in the *CORE* case, supra, and in this case when this Court originally granted a stay of the remand order pending appeal whether the express provisions of 1447(b) applied to Civil Rights cases. We discussed this issue in the *CORE* case. This discussion need not be repeated by reason of the fact we have now determined that whether or not remand orders in such cases were appealable before the passage of the Civil Rights Act, the adoption of that Act by Congress forecloses the issue in favor of appealability.

[2] The appellee's contention that this appeal is untimely has no merit. The notice of appeal was filed sixteen calendar days after the order appealed from, and it could only be considered untimely if the ten-day time limit of Fed. R. Crim. P. 37(a)(2) were applicable. It is absolutely clear, however, that Rule 37 has no application here.

The Supreme Court promulgated Rules 32 through 39, without submitting them to Congress, under the authority of the Criminal Appeals Rules Act. Act of Feb. 24, 1933, c. 119, 49 Stat. 904, as amended, 18 U.S.C. §3772. The only power given under that Act was to prescribe rules of procedure "with respect to any or all proceedings *after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty . . . .*" (Emphasis added.) When it adopted the predecessor to Rule 37(a)(2), see 292 U.S. 661, 662, and when it promulgated that Rule in its present form, see 327 U.S. 825, the Supreme Court made it explicit that the Rule was meant to apply only to criminal appeals "after verdict, or finding of guilt . . . or plea of guilty."

The question whether the predecessor to Rule 37(a)(2) applied to a criminal appeal prior to verdict—in that case an appeal from an adjudication of criminal contempt—was squarely decided in *Nye* v. *United States*, 1941, 313 U.S. 28, 43-44. Rejecting the argument that the Criminal Rules applied to all cases that could be categorized as "criminal", the Court held that the history and the language of the order promulgating the Rule required that

tion of the removal statutes. Title 28 U.S.C.A. §1443, provides as follows:

"§1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place where it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refusing [fol. 37] to do any act on the ground that it would be inconsistent with such law."

The meaning of this statute, passed in a package with the first post-bellum Civil Rights Act, Act of April 9, 1866, 14 Stat. 27, has been the subject of debate since its passage. It was originally construed to cover cases in which the de-

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it be applied only "with respect to any or all proceedings *after verdict* in criminal cases." (Emphasis added.)

In 1940, Congress authorized the Supreme Court to prescribe rules of procedure in criminal proceedings "prior to and including verdict." Act of June 29, 1940, c. 445, 54 Stat. 688, as amended, 18 U.S.C. §3771. Rules 1-31 and 40-60 were promulgated under the authority of this Act. It is clear that Rule 37(a)(2) can find no authority in this statute. Not only was it expressly prescribed under the "after verdict" enabling act, see 327 U.S. 825, but, as authorized in that act, it was never submitted to Congress. Under the "prior to verdict" enabling act, no rule could become effective unless submitted to Congress for its acquiescence. Only Rules 1-31 and 40-60 were so submitted. See 327 U.S. 824; Dession, The New Federal Rules of Criminal Procedure: II, 56 Yale L.J. 197, 230 (1947).

fendant alleged his inability to obtain a fair trial due to such informal impediments as local prejudice. *State* v. *Dunlap*, 1871, 65 N.C. 491; see also *Ex parte Wells*, 3 Woods 128, quoted in *Kentucky* v. *Powers*, 1906, 201 U.S. 1, 27 (Bradley, J., on circuit).

Later, the view was taken that only formal impediments, stemming from State legislation, could give rise to such deprivations of equal civil rights as would allow a defendant to invoke federal jurisdiction by removal. *Kentucky* v. *Powers*, 1906, 201 U.S. 1. As this latter view was the latest Supreme Court pronouncement directly on the matter, the district court in the present case felt bound by it. In remanding the case to the State court, the district court states that "A criminal prosecution or a civil case under this statute [28 U.S.C.A. §1443] because of a civil right or the enforcement of such right must arise out of the destruction of such right by the Constitution or statutory laws of the State wherein the action is pending."

In delineating the scope of the civil rights removal statute for the first time, the Supreme Court placed great stress on the necessity that the denial of protected rights be made to appear in advance of trial, *Virginia* v. *Rives*, 1879, 100 [fol. 38] U.S. 313. By way of illustration, the Court indicated that denials of equal rights at the hands of court officials, occurring during trial, could not be cured by removal but that such denials under state legislation could be safeguarded against in this manner. It has been argued that, under a realistic appraisal of the facts in a given case, the Supreme Court today would recognize the right to removal under §1443(1) even where no legislative denial of rights is shown. See Krieger, "Local Prejudice and Removal of Criminal Cases From State to Federal Courts," 19 St. John's L. Rev. 43 (1944); Note, "Local Prejudice in Criminal Cases," 54 Harv. L. Rev. 679, 685-86 (1941). Such a recognition by the Court thus would reemphasize the putative essence of *Virginia* v. *Rives*—that the denial of equal rights must be susceptible of demonstration before trial—and minimize the illustrative language in that case dealing with state legislation.

We have been asked by the appellants to anticipate such an interpretation of §1443 by the Supreme Court; however, there is no reason for us to reach that question in this case. This is so for two reasons. First, the petition in this case did allege the denial of protected rights by State legislation. Secondly, the passage of the Civil Rights Act of 1964 and its interpretation in *Hamm* v. *City of Rock Hill*, 1964, —— U.S. ——, provide a different, and narrower, ground on which this case may be disposed of.

After alleging the specific facts respecting the arrests of each of the 20 persons, including allegations that each of them was, when arrested, seeking food or accommoda- [fol. 39] tions at a restaurant or hotel, the petitioners alleged that each of their acts had been followed by special Grand Jury presentments charging them with violating the named section of the Georgia Code, and that the said presentments were pending in the Superior Court of Fulton County and were to be heard within a few days if not transferred. They then alleged the following:

> "(3) By virtue of Title 28, United States Code Annotated, Section 1443(1) and (2), this Court has jurisdiction to hear and try the charges now pending against the petitioners. Removal is sought to protect the rights guaranteed to petitioners under the due process and equal protection clauses of Section 1, Fourteenth Amendment of the Constitution of the United States and to protect the right of free speech, association, and assembly guaranteed by the First Amendment of the Constitution of the United States.
>
> "Moreover, petitioners are being prosecuted for acts done under color of authority derived from the constitution and laws of the United States and for refusing to do an act which was, and is, inconsistent with the Constitution and Laws of the United States.
>
> "(4) The petitioners are denied and/or cannot enforce in the Courts of the State of Georgia rights under

the Constitution and Laws of the United States providing for the equal rights of citizens of the United States and all persons within the jurisdiction thereof, in that, among other things, the State of Georgia by *statute*, [fol. 40] custom, usage, and practice supports and maintains a policy of racial discrimination." (Emphasis added).

The district court apparently decided that, since the removal petition did not expressly allege that Section 26-3005 was unconstitutional on its face, the petition failed to allege adequately that "the destruction of" the right to equal protection granted by the United States Constitution was caused by "statutory laws of the State" of Georgia. The allegation contained in paragraph 4 of the petition for removal, quoted above, that petitioners were denied their rights under the constitution and laws of the United States because the State of Georgia "by statute . . . supports and maintains a policy of racial discrimination," however, clearly asserts the precise ground for removal that the trial court said was required. This would not be so, of course, if a petition for removal, unlike other pleadings under the Federal Rules of Civil Procedure, must contain something more than the bare bones allegation of the existence of a right. As to this matter, we have no doubt that the rules of notice pleading apply with as much vigor to petitions for removal as they do to other pleadings, which, according to Rule 8(f) of the Federal Rules of Civil Procedure, "shall be so construed as to do substantial justice." The statute requires that the petition for removal contain "a short and plain statement of the facts which entitle him or them to removal." 28 U.S.C.A. §1446. The Supreme Court has held that the removal must be effected by the filing of "a verified petition setting forth, agreeably to the ordinary rules of [fol. 41] pleading, the particular facts, not already appearing, out of which the right arises." *Chesapeake & Ohio Railway Co.* v. *Cockrell*, 1914, 232 U.S. 146, 151. It is plain, therefore, that the petition is to be construed "agreeably to

the ordinary Rules of pleading" since in fact the petition for removal is the basis for the federal court's jurisdiction and it is a pleading of the facts necessary to vest jurisdiction in the federal court.

In *Allman* v. *Hanley*, 5 Cir., 1962, 302 F. 2d 559, 562, this Court said:

> "The absence of detailed grounds setting forth basis for removal is not fatal to defendants' right to remove. We think that the allegation that petitioners were officers acting under color of office in the employment of the United States was sufficient. Title 28, United States Code, Section 1446(a) requires only a short, plain statement of facts entitling a defendant to removal."

This is in line with this Court's construction of the Federal Rules of Civil Procedure relating to the liberality of pleadings under the rules. If a petition for removal states sufficient in the way of allegations to support proof of adequate grounds for removal, it is to be treated in the same manner as a complaint in federal court. As to such a pleading, this Court has frequently reiterated what we said in *Des Isles* v. *Evans*, 5 Cir., 1952, 200 F. 2d 614, 615, in quoting Moore's Federal Practice:

> "The courts have ruled time and again that a motion to dismiss for failure to state a claim should not be [fol. 42] granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim."

In that case we also quoted from an opinion by this Court in *De Loach* v. *Crowley's Inc.*, 5 Cir., 1942, 128 F. 2d 378, 380:

> "Under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the

pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings."

We conclude, therefore, that this petition for removal adequately alleged that the appellants suffered a denial of equal civil rights by virtue of the statute under which they were being prosecuted in the State court. Unless there is patently no substance in this allegation, a good claim for removal under §1443(1) has been stated. That the allegation does not lack substance may be seen from a consideration of the Civil Rights Act of 1964, as construed by the Supreme Court.

Statutes of South Carolina and Arkansas, substantially the same as the Georgia statute involved here, were before the Supreme Court in *Hamm* v. *City of Rock Hill, supra.* Having upheld the constitutionality of Title II (Public Accommodations) of the Civil Rights Act of 1964 both as respects businesses serving interstate travelers and businesses of a more local nature a substantial part of whose products have moved in commerce, *Heart of Atlanta Motel,* [fol. 43] *Inc.* v. *United States,* 1964, —— U. S. ——; *Katzenbach* v. *McClung,* 1964, —— U.S. ——, the Court in *Hamm* held that prosecutions under State anti-trespass statutes may not stand if the denial of service or the request for removal from the premises was based upon an intent to discriminate against the arrested persons on account of race. The Court ruled that "The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. Although the conduct in the present cases occurred prior to enactment of the Act, the still pending convictions are abated by its passage." The Court further said:

> "In short, now that Congress has exercised its constitutional power in enacting the Civil Rights Act of 1964 and has declared that the public policy of our country is to prohibit discrimination in public accommodations as therein defined, there is no public interest to be served in the further prosecution of the peti-

tioners. And in accordance with the long established rule of our cases they must be abated and the judgment in each is therefore vacated and the charges are ordered dismissed."

In the removal petitions in the cases pending before this Court, it is explicitly alleged that the arrests of appellants "were effected for the sole purpose of aiding, abeting, and perpetuating customs, and usages which have deep historical and psychological roots in the mores and [fol. 44] attitudes which exist within the City of Atlanta with respect to serving and seating members of the Negro race in such places of public accommodation and convenience upon a racially discriminatory basis and upon terms and conditions not imposed upon members of the so-called white or Caucasian race. Members of the so-called white or Caucasian race are similarly treated and discriminated against when accompanied by members of the Negro race." These are allegations of fact, which if true, place these prosecutions by the State of Georgia squarely within the principle announced by the Supreme Court in *Hamm* v. *City of Rock Hill.*

In its opinion, the Supreme Court pointed out that no State may now prosecute Negroes who were charged with having refused to leave premises in accordance with the provisions of the Georgia statute where the request to leave was based upon a policy of racial discrimination. The Court pointed out that Section 203 of the Act provides:

> "No person shall (a) withhold, deny or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by Section 201 or 202, or (b) intimidate, threaten or coerce any person with the purpose of interfering with any right or privilege secured by Section 201 or 202, or (c) *punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured* by Section 201 or 202." (Emphasis in Supreme Court opinion).

[fol. 45] The Court said, "On its face, this language prohibits prosecution of any person for seeking service in a covered establishment because of his race or color." The Court then proceeded to apply this prohibition to pending as well as prospective prosecutions. If therefore, the arrests and prosecutions of the appellants "were effected for the sole purpose of aiding, abetting and perpetuating customs . . . with respect to serving and seating members of the Negro race" in the respective restaurants "upon a racially discriminatory basis," as alleged, then under the holding of the Supreme Court these prosecutions will have to be abated.

Because of the Civil Rights Act of 1964, Title II, and its recent interpretation by the Supreme Court, we hold that the allegations of these petitions are sufficient to invoke federal jurisdiction under 28 U.S.C.A. §1443(1). That statute provides, as it has provided since its enactment in 1866, a federal forum in civil actions and criminal prosecutions to vindicate, in certain circumstances, rights "under any law providing for the equal civil rights of citizens of the United States." When the removal statute was originally enacted, the "law providing for . . . equal civil rights" most clearly contemplated was found in sections 1977 and 1978 of the Revised Statutes, *Strauder* v. *West Virginia,* 1879, 100 U.S. 303, 311. These sections formed part of the 1866 Civil Rights Act along with the removal provisions. In unholding the constitutionality of the removal statute, the Supreme Court made it clear that that act was merely one legitimate way for Congress to ensure the effectiveness of the substantive provisions of the civil rights laws. *Strauder* v. *West Virginia, supra,* [fol. 46] at 310-12. The Court said, "A right or an immunity, whether enacted by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress. . . . And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case

from a State court, in which the right is denied by the State law, into a Federal court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws. Sec. 641 [now §1443(1)] is such a provision." See also *Virginia* v. *Rives*, 1879, 100 U.S. 313, 318.

From its inception, then, the civil rights removal statute has been, as its language plainly contemplates, an adjunct to the substantive civil rights statutes enacted by Congress. The history of the several codifications and recodifications of sections 1977 and 1978, of the several amendments and enlargements upon these seminal civil rights laws, and of the parallel codifications and recodifications of the removal statute which is presently 28 U.S.C.A. §1443(1) amply supports this view of the tenor of the statutory language. (The history of these provisions is easily traceable through annotations in U.S.C.A.). It can not be doubted that §1443(1) is today an adjunct of the Civil Rights Act of 1964. See *New York* v. *Galamison*, 2nd Cir., 1965, —— F. 2d ——, 33 U. S. Law Week 2389". Particularly is this so in light of the references to the provision of a federal forum on removal for the protection of substantive civil rights in the act itself, Title IX, §901, and in its legislative history. See House [fol. 47] Judiciary Committee Report reprinted in BNA, The Civil Rights Act of 1964, pp. 286-87; remarks of Senator Dodd, 110 Cong. Rec. 6739 (daily ed. April 6, 1964).

Congress, while carving out rights and immunities in the area of civil rights, has provided a jurisdictional basis for efficiently and appropriately protecting those rights and immunities in a federal forum. The provision of this protective forum is not limited by the States' obligation, under the Supremacy Clause, to protect federally guaranteed civil rights as zealously as would a federal court. That there is such an obligation on State tribunals is true, and vital, but it is irrelevant here. Theoretically, there is no need for any federal jurisdiction at all—except that of the Supreme Court—because State courts are required to protect federally created rights. Nevertheless, the power of Con-

gress to provide a federal forum also to protect such rights is undoubted. Such power was exercised in enacting §1443 (1).

The federally guaranteed right and immunity here pertinent were elucidated by the Supreme Court in *Hamm* v. *City of Rock Hill, supra,* as follows:

> "[T]he language of §203(c) supports a conclusion that non-forcible attempts to gain admittance or remain in establishments covered by the Act, are immunized from prosecution, for the statute speaks of exercising or attempting to exercise a 'right or privilege' secured by its earlier provisions. The availability of the Act as a defense against punishment is not limited solely to those [fol. 48] who pursue the statutory remedies. The legislative history specifically notes that the Act would be a defense to criminal trespass, breach of the peace and similar prosecutions."

Under the allegations of the petitions in the present case, these appellants have been denied, because of State legislation, "a right under . . . [a] law providing for the equal civil rights of citizens of the United States." They are entitled to a federal forum as provided for in 28 U.S.C.A. Sec. 1443(1) in which to prove these allegations. If the allegations are proved, then the federal court acquires jurisdiction for all purposes. Under normal circumstances the state prosecutions would then proceed in the federal court. Here, however, the finding of the jurisdictional fact immediately brings the *Hamm* case into play. The same fact determination requires dismissal rather than further prosecution in the District Court.[8]

Upon remand, therefore, the trial court should give appellants an opportunity to prove the allegations in the removal petition as to the purpose for the arrests and prosecutions, and in the event it is established that the

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[8] In light of the view we have taken of this case, it is unnecessary to review the appellants' contention that they are also entitled to removal under 28 U.S.C.A. §1443(2).

removal of the appellants from the various places of public accommodation was done for racial reasons, then under authority of the *Hamm* case it would become the duty of the district court to order a dismissal of the prosecutions without further proceedings.

Concluding, as we do, that the petition for removal alleges sufficient grounds showing a denial of the civil [fol. 49] rights of the appellants in the state courts by reason of the State statute, it follows that the order of remand was in error and it must be reversed and the case remanded to the district court for further proceedings not inconsistent with this opinion.

Reversed and Remanded.

BELL, Circuit Judge, concurring in part and dissenting in part:

I regret that I cannot concur altogether in the opinion of the majority. The reasoning preliminary to the holding therein seems to embrace the following steps. We begin with the jurisdictional base, i.e., the removal statute. 28 USCA, § 1443(1). Next, the case of *Kentucky* v. *Powers*, 1906, 201 U.S. 1, is cited for authority that the removal statute is limited to those situations where a state law gives rise to the deprivation of equal civil rights by reason of which a defendant seeks to invoke federal jurisdiction. Then the removal petition itself is construed, and the conclusion reached that appellants do indeed assert that they were being denied their equal civil rights in the state court because of a Georgia statute. The fact that the statute is nowhere specified is met by applying the philosophy of federal notice type pleading to the bare allegation of the removal petition, to the end of assuming that the petition referred to Georgia Code 26-3005, the anti-trespass statute.[1] It is also [fol. 50] assumed that appellants will claim on hearing that

[1] It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises

the statute is either unconstitutional on its face or as applied by the state court to appellants. The unconstitutionality in application may be claimed on the holding of the Supreme Court in *Hamm* v. *City of Rock Hill*, 1964, —— U.S. ——, —— S.Ct. ——, 13 L.Ed.2d 300, in its retroactive application of the Civil Rights Act of 1964 for reason of national policy to the socalled sit-in cases. That case protects persons engaged in peaceable sit-ins in restaurants covered by the Act from prosecution.

Thus, the majority concludes that the removal petition may fairly be read as alleging a valid claim for removal under 28 USCA, § 1443(1). And up to this point, I am in agreement with the majority. That is, I agree that the removal petition may now be read to allege that appellants are unable to enforce in the Georgia courts the right, conferred by the Civil Rights Act of 1964 as construed by *Hamm* v. *City of Rock Hill*, to be free from prosecution under state trespass statutes for peaceful sit-in demonstrations. The fact is that appellants were being prosecuted under such a statute, viz., Ga. Code § 26-3005. Therefore I also agree that the District Court erred in remanding to the state court without a hearing. However, I wish to disassociate myself from that part of the holding as to how these cases are to be treated on remand to the District Court.

We should reverse and remand for a hearing on the question of jurisdiction. But, the majority states, and this [fol. 51] is where I disagree, that upon remand the trial court should give appellants the opportunity to prove their allegations as to the purpose of the arrests and prosecutions, and in the event the refusal of service in places of public accommodation was for racial reasons, then under the authority of the *Hamm* case it would become the duty of the District Court to dismiss the prosecutions.

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or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor. (Ga. Laws 1960, p. 142)

If this is all that remains for consideration on remand, the holding of the majority is tantamount to applying *Hamm* v. *Rock Hill* in all its sweep against trespass statutes, retroactively to the State of Georgia. It is, in effect, a holding that Georgia has applied and will continue to apply its trespass statute contrary to the teachings of the Supreme Court in *Hamm*, even though *Hamm* had not been decided when the cases were in the state courts and even though the state courts have not had an opportunity to deal with these cases in the light of *Hamm*. In dispensing with the requirement that appellants prove on remand that the Georgia courts will not accord them their rights under the *Hamm* decision, the theory of the majority must be that *Hamm* has tainted these prosecutions *ab initio*, and hence jurisdiction in the federal court has been established retroactively by the very fact that the prosecutions were ever commenced. This casual treatment of the Georgia co is a striking departure from my concept of Federalism and from the duty which I think comity imposes upon us with regard to that system.

The fact is that the Supreme Court had never, before and absent *Hamm* and the 1964 Civil Rights Act, held the use of state trespass statutes under the circumstances here pre- [fol. 52] sented to be unconstitutional. This was one of the problems that the Civil Rights Act sought to obviate. See the following cases where the question was pretermitted: *Griffin* v. *Maryland*, 1964, —— U.S. ——, 84 S.Ct. 1770, 12 L.Ed.2d 754; *Barr* v. *Columbia*, 1964, —— U.S. ——, 84 S.Ct. 1734, 12 L.Ed.2d 766; *Robinson* v. *Florida*, 1964, —— U.S. ——, 84 S.Ct. 1693, 12 L.Ed.2d 771; *Bell* v. *Maryland*, 1964, —— U.S. ——, 84 S.Ct. 1814, 12 L.Ed.2d 822; and *Bouie* v. *Columbia*, 1964, —— U.S. ——, 84 S.Ct. 1697, 12 L.Ed.2d 894. We recognized this fact in *Poole* v. *Barnett*, 5 Cir., 1964, 336 F.2d 267. It is now undoubtedly true that the 1964 Civil Rights Act and the *Hamm* decision have placed a gloss on state trespass statutes so that they may not be applied against those peaceably seeking service in restaurants covered by the Act, or against those whose prosecutions for such activity were pending at the time of

the passage of the Act. However, in view of this gloss being of a supervening nature, I would give the Georgia court from whence these cases were removed a chance to apply the *Hamm* doctrine unless appellants can demonstrate on remand to the District Court that the Georgia court would not fairly accord them their rights under *Hamm*.

Thus, on remand the District Court should first determine just what appellants do claim under the present allegations of their notice type pleading. If they contend that the statute is unconstitutional in its application to them by the state, by virtue of the *Hamm* case or otherwise, then the question will arise whether the state in fact seeks to apply the statute in an unconstitutional manner. If it appears, and the burden would be on appellants to show [fol. 53] this, that the state will apply the statute contrary to the teachings of *Hamm*, the District Court should deny remand and retain the cases for disposition; otherwise, the cases should be remanded.

I doubt that appellants can point to any right that would be jeopardized by remand to the state court. The Supreme Court of Georgia has already applied *Hamm* to a group of sit-in convictions with the result of abating the conviction and ordering the cases dismissed. *Holton, et al.* v. *State of Georgia*, No. 22,810, decided February 8, 1965. Such jeopardy as may be involved is jeopardy to our dual system of courts, federal and state. And a federal court should not lightly intrude into a sphere of activity left to state and local government under the Constitution: the maintenance of local order. Because the decision of the majority goes to the point of vesting jurisdiction in the federal court retroactively, a step further than the Supreme Court went in *Hamm*, I respectfully dissent.

WHITEHURST, District Judge, concurring in part and dissenting in part:

I concur in Judge Tuttle's opinion on the merits. However, the Notice of Appeal having been filed six days later than permitted under Rule 37(a)(2) of the Rules of Criminal Procedure, I would dismiss the appeal.

[fol. 54]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21354

D. C. Docket No. 23,869

THOMAS RACHEL, *et al.*, Appellants,

versus

STATE OF GEORGIA, Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before Tuttle, Chief Judge, Bell, Circuit Judge, and Whitehurst, District Judge.

JUDGMENT—March 5, 1965

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, State of Georgia, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"Bell, Circuit Judge, concurring in part and dissenting in part".

"Whitehurst, District Judge, concurring in part and dissenting in part".

March 5, 1965

Issued as Mandate:

[fol. 55]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21,354

[Title omitted]

Appeal from the United States District Court for the Northern District of Georgia.

PETITION FOR REHEARING EN BANC—Filed March 25, 1965

Pursuant to Rule 29 of this Court, as amended, the State of Georgia, Appellee, respectfully files its Petition for Rehearing En Banc, within the time allowed by said Rule, from the judgment entered by this Court on March 5, 1965, reversing the Order of Remand appealed from, and remanding the case to the District Court for further proceedings. The Petition for Rehearing En Banc is based upon the following grounds:

Ground I

The majority of the Court, District Judge Whitehurst dissenting, erred in failing to grant the Motion to Dismiss Appeal filed by Appellee, based on the ground that the Notice of Appeal from the Order of Remand was not timely filed, having been filed more than ten days from the date of the entry of the Order of Remand.

[fol. 56]

Ground II

The majority of the Court, District Judge Whitehurst dissenting, erred in considering and deciding the appeal on its merits where the Notice of Appeal was filed sixteen calendar days after the entry of the Order of Remand appealed from.

Ground III

The majority of the Court, District Judge Whitehurst dissenting, erred in holding that the ten day time limit

for filing of the Notice of Appeal after entry of the Order of Remand appealed from, which is prescribed by Rule 37 (a) (2), Fed. R. Crim. P., has no application to this case.

Ground IV

The majority of the Court, District Judge Whitehurst dissenting, erred in holding that Rule 37 (a) (2), Fed. R. Crim. P. in its present form applies only to criminal appeals "after verdict or finding of guilt . . . or plea of guilty."

Ground V

The Court erred in holding, upon the merits, that the Petition for Removal did in fact allege the denial of protected rights by State legislation.

Ground VI

The Court erred in holding upon the merits, that a Petition for Removal, like other pleadings under the Federal Rules of Civil Procedure, need contain only the "bare bones allegation of the existence of a right."

Ground VII

The Court erred in holding that the Petition for Removal adequately alleged that the Appellants suffered a denial [fol. 57] of equal rights by virtue of the statute under which they were being prosecuted in the State court.

Ground VIII

The Court erred in holding that the Petition for Removal alleges a valid claim for removal under Section 1443 (1), Title 28, U.S.C.

Ground IX

The Court erred in holding that the Appellants are entitled to a hearing in a federal forum for the purpose of proving their allegations of denial of rights under a law

providing for their equal rights because of State legislation, and in holding that the District Court erred in remanding said cases to the State Court without such a hearing.

Ground X

The majority of the Court, Circuit Judge Bell dissenting, erred in holding that, if upon a hearing before the District Court it is established that the removal of Appellants from the various places of public accommodation was done for racial reasons, it would become the duty of the District Court to order a dismissal of the prosecutions without further proceedings.

Ground XI

The majority of the Court, Circuit Judge Bell dissenting, erred in holding that the United States Supreme Court case of *Hamm* v. *City of Rock Hill,* 1964, 33 U.S. Law Week 4079, requires a dismissal of the prosecutions by the Federal District Court solely upon proof that racial reasons were the cause of the removal of Appellants from [fol. 58] the places of public accommodation. The majority of the Court erred herein by leaving no discretion in the District Court to consider whether the evidence adduced in the hearing places these cases within the purview of *Hamm* and by imposing no burden upon Appellants to prove that the State Court would not apply the doctrine of *Hamm* fairly to Appellants if the cases were remanded to the State Court.

Ground XII

The Court erred in reversing the Order of Remand of the District Court.

Brief in Support of Petition for Rehearing En Banc

With one exception, all of the Grounds raised by this Petition have been exhaustively briefed by both parties and argued at length before this Court. Therefore, Ap-

pellee will confine its citation of authorities for the most part to pointing out cases and factors apparently overlooked by the Court.

Grounds I, II, III, and IV

These Grounds all deal with the failure of the majority of the Court to grant Appellee's Motion to Dismiss Appeal, and the action of the majority of the Court in considering the appeal on its merits, holding that Rule 37 (a) (2), Fed. R. Crim. P. has no application to this case and holding that said Rule in its present form applies only to criminal appeals after verdict, or finding of guilt . . . or plea of guilty. Appellee respectfully contends that Rule 37 (a) (2) does control the time limit of ten days from the entry of the Remand Order for the filing [fol. 59] of the Notice of Appeal in this case, and further contends that said Rule does apply, in its present form, to orders entered in criminal cases *prior to* verdict, finding of guilt or plea of guilty.

The majority of this Court held the appeal in this case to be timely, though admittedly not filed within ten days, by holding that Rule 37 had no application to any criminal case except after verdict, finding of guilt, or plea of guilty.

This contention was never urged or suggested by Appellants before this Court, either in their very thorough and lengthy brief or in extended oral argument. Therefore, counsel for Appellee will discuss this point in greater detail than will be devoted to other grounds of this Petition.

Appellee respectfully insists that certain material factors were overlooked by the majority of the Court in holding that Rule 37 (a) (2) is limited in its application to appeals from judgments and orders in criminal cases after verdict, finding of guilt or plea of guilty. The last sentence of Rule 37 (a) (2) itself demonstrates clearly the fallacy of the majority ruling. This sentence is worded as follows:

"Rule 37. Taking appeal; and Petition for Writ of Certiorari

(a) Taking Appeal to a Court of Appeals

(2) . . . An appeal by the government when authorized by statute shall be taken within 30 days after entry of the judgment or order appealed from."

[fol. 60] Since the government has absolutely no power of appeal in criminal cases after verdict, finding of guilt or guilty plea, it seems absolutely clear that Rule 37 (a) (2) *must* control appeals of "prior to verdict" judgments and orders. To hold otherwise would be to hold that half of the paragraph (that portion setting out the 10 day limitation on appeals by *defendants*) applies to "after verdict" cases while the final sentence of said paragraph applies to "before verdict" orders and judgments when the government wishes to appeal. This would be a most novel construction of a procedural rule!

The government can only appeal judgments and orders in criminal cases in very few instances, including the dismissal of an indictment *before trial*, and the suppression of evidence *before trial* in a narcotics case. Never can the government appeal a verdict of not guilty! Appellee therefore respectfully requests the majority of the Court to reconsider its construction of this Rule in light of the last sentence. If Rule 37 (a) (2) is restricted to "after verdict" appeals, the last sentence thereof is completely without meaning when the government wishes to appeal.

Secondly, the majority of this Court has completely overlooked Rule 54 (b) (1), Fed. R. Crim. P., which expressly makes the Federal Rules of Criminal Procedure, including Rule 37, applicable to all procedure in criminal prosecutions removed to Federal District Courts from State Courts, as follows:

"Rule 54. Application and Exception

(a) . . .

[fol. 61] (b) Proceedings

(1) Removed Proceedings. These rules apply to criminal prosecutions removed to the United States district courts from state courts and *govern all procedure after removal,* except that dismissal by the attorney for the prosecution shall be governed by state law." (Italics added)

The Court in its majority opinion on this point correctly notes that Rules 1-31 and 40-60 (which includes 54, of course) were promulgated by the Supreme Court under the "prior to verdict" enabling Act of June 29, 1940, 54 Stat. 688, and were properly submitted to Congress. Thus, this Rule expressly states that "these Rules" govern all procedure after removal in precisely the same special class of cases (removed criminal prosecutions) as the ones in the instant case.

Further, it is important to note that the predecessor to Rule 37, which was Rule III, had been in effect long before Rule 54 was promulgated. Old Rule III became effective on September 1, 1934 (292 U.S. 661). Rule 54, among others, was promulgated by the Supreme Court on December 26, 1944 (See 327 U.S. 825). Thus it is clear that Rule 54 was intended to encompass old Rule III, which was then in effect, and had been for ten years. And finally, Rule 37 and Rule 54 in virtually their present form were consecutively numbered, indexed, given their title in the same Supreme Court order on February 6, 1946, and published in Volume 327 of the United States Reports, pages 827-876. Our conclusion is that Rule 54, which is the one [fol. 62] Rule spelling out the application of all the Rules to various types of proceedings, without question included Rule 37 as governing procedure in criminal cases removed from State to Federal Courts.

Finally, the Court in its majority opinion pointed out that Rules 32 to 39 were not submitted to Congress pursuant to the "prior to verdict" enabling Act of June 29, 1940, 54 Stat. 688, as amended. This is quite true. However, the majority of the Court overlooked the fact that in the Act of June 25, 1948, c. 645, 62 Stat. 683 entitled "An Act to Revise, Codify, and Enact into Positive Law Title 18 of the United States Code," there appears at page 845 of that statute the following:

"Section 3732. Taking of Appeal—Notice—Time (Rule)

See Fed. Rules of Crim. Procedure, Rule 37 (a)"

Thus it is apparent that Congress *did* consider Rule 37 by embodying it by reference within this enacting, codifying and revising statute, and approved it by passing the statute in that form.

We also feel that the majority of the Court misconstrued and misapplied *Nye* v. *United States,* 1941, 313 U.S. at 43-44. *Nye* was not a criminal case, but an adjudication of criminal contempt arising out of a civil case. The main thrust of the decision in *Nye* was that "the categories of cases embraced in the rules cannot be expanded by interpretation to include this type of case." 313 U.S. at page 45. Counsel for Appellee sincerely doubt that the Supreme Court would hold today that Rule 37 is applicable only to "after verdict" cases, in view of all that has happened since the *Nye* decision in 1941. We re-[fol. 63] fer to the enactment of the 1948 Act codifying Title 18, the promulgation of Rule 54 making all the Rules applicable to removed criminal cases, and the amendment to Rule 37 fixing a 30 day time limit for appeal by the government in criminal cases. A distinguished Advisory Committee of outstanding legal scholars worked from February 3, 1941 for nearly three years preparing the "prior to and including verdict" Rules and it is inconceivable that they would have left Rules 32-39 hanging in limbo and applicable only to "after verdict" appeals. It is our belief

that Rule 54 in its entirety does make Rules 32-39 generally applicable to any final order in a criminal case at any stage of the proceedings.

Appellee therefore respectfully insists that District Judge Whitehurst was correct as a matter of law in his partially dissenting opinion, and that the appeal should have been dismissed as being untimely.

Grounds V, VI, VII, VIII and IX

Each of these grounds are essentially similar, in that all deal with the alleged error of this Court on the merits, holding that the Removal Petition filed by Appellants was sufficient as a matter of law to allege a valid claim for removal under Section 1443 (1), Title 28, U.S.C., and that a "bare bones allegation of the existence of a right" requires a hearing before the District Court. Therefore all grounds will be discussed together.

Appellee feels that the Court has overlooked, or has failed to give proper effect to, numerous prior decisions of federal courts which hold that the federal district court must determine its jurisdiction to entertain removed cases, based upon the allegations of the petition for removal. These cases include *Birmingham* v. *Croskey,* D.C., N.D., Ala., 1963, 217 F. Supp. 947; *North Carolina* v. *Jackson,* [fol. 64] D.C., M.D. N.C., 1955, 135 F. Supp. 682; and *Arkansas* v. *Howard,* D.C., E.D. Ark., 1963, 218 F. Supp. 626. In particular, this Court overlooked a controlling opinion of the United States Supreme Court in *Maryland* v. *Soper,* Judge, (No. 1), 1925, 270 U.S. 9, where the Supreme Court granted a writ of mandamus ordering the remand of a removed criminal case to the Courts of Maryland. The Supreme Court considered *nothing but the amended petition for removal,* which is much longer and more factually detailed than the one in the instant case. The Court stated in part in its order granting the writ of mandamus, "Should the District Court deem it proper to allow another amendment to the petition for removal, by

which the averments necessary to bring the case within Sec. 33 are supplied, he will be at liberty to do so. Otherwise the prosecution is to be remanded as upon a peremptory writ." The Court *did not* direct an evidentiary hearing at which essential averments missing from the removal petition could be supplied by testimony. In fact, counsel for Appellee do not know of any case involving the removability of a criminal case from State to Federal Court where it has been held that an evidentiary hearing before the District Court is necessary on "notice type pleadings" such as were filed in the instant case by Appellants.

If District Courts are required to hold detailed and possibly prolonged hearings on totally inadequate petitions for removal which on their face do not clearly show a right of removal (it is impossible to tell from the pleadings in this Petition for Removal just what Appellants do claim—see comment of Circuit Judge Bell on page 19 of the slip opinion), a greatly enlarged burden will be imposed upon such District Courts.

[fol. 65] Appellee respectfully points out that the opinion of this learned Court that a valid claim for removal is stated by the removal petition appears to be based almost entirely upon the use of one word, "statute." The Petition does not even specify by use of *what statute* the State of Georgia allegedly "supports and maintains a policy of racial segregation." This is far too vague to set out a valid cause for removal. Appellee suggests that the Court has overlooked that portion of *Virginia* v. *Rives,* 1879, 100 U.S. 313 which states, at page 320, "By the express requirement of the statute [Section 641, the predecessor of Section 1443(1)] *his petition must set forth the facts* upon which he bases his claim to have his case removed and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings." The Court also overlooked 12 other federal cases to the same effect previously cited in Appellee's brief on the merits, found at Pages 47 and 48, which will not be cited again here, in the interest of space and brevity.

Appellee strongly maintains that no facts sufficient to justify either a removal or a hearing are alleged in this Petition for Removal, and that the District Court did not err in his remand order without a hearing.

Grounds X and XI

Counsel for Appellee strongly urge the majority of this Court that the directive laid down to the District Court as to what should be done upon remand of these cases is erroneous. The majority opinion states that the District Court should give Appellants an opportunity to prove the purpose of their arrests and prosecutions, and if it is established that their removal "from the various places of public accommodation was done for racial reasons, then [fol. 66] under authority of the *Hamm* case it would become the duty of the district court to order a dismissal of the prosecutions without further proceedings."

This virtual mandate to the lower Court goes far beyond any prior ruling by the United States Supreme Court, including the *Hamm* case, supra. It completely ties the hands of the District Court, and strips him of any judicial discretion, regardless of what other evidence may be forthcoming at the hearing. The *Hamm* decision is limited strictly to *peaceful* and *non-forcible* attempts to gain admittance or remain in establishments covered by the Civil Rights Act of 1964. The words "peaceful" and "non-forcible" appear three times in the *Hamm* majority opinion. The Supreme Court has consistently stressed, even in reversing convictions, in cases apparently overlooked by this Court involving racial demonstrations and "sit-ins" prosecuted in State Courts, that the defendant-demonstrators were peaceful, and the demonstrations were non-forcible. Several quotations from recent Supreme Court majority decisions follow:

(1) "There was no testimony that petitioner raised his voice, used offensive language, resisted the officers,

or engaged in any conduct of any kind to adversely affect the good order and tranquility of the City of Louisville." *Thompson* v. *Louisville*, 1962, 362 U.S. 199, 205.

(2) "There was no evidence that any of the demonstrations which resulted from the meeting (to get volunteers for a sit-down demonstration) were disorderly or otherwise in violation of law." (Explanatory words added.) *Shuttlesworth* v. *City of Birmingham, Alabama*, 1963, 83 S. Ct. 1130, 1132.

(3) "The manager and the police conceded that the petitioners were clean, well dressed, inoffensive in con- [fol. 67] duct and that they sat quietly at the counter. . . ." *Peterson* v. *Greenville, South Carolina*, 1963, 83 S. Ct. 1119, 1121.

(4) "There was no evidence that any of the Petitioners were disorderly." *Griffin* v. *Maryland*, 1964, 84 S. Ct. 1770, 1771.

Many other similar statements by the Supreme Court in this type of case could be cited. Their relevance is this: let us suppose, as a hypothetical case, but one which well might be applicable to these Appellants, that upon the hearing the District Court found from the evidence that certain Appellants were in fact removed from the eating establishments because of racial reasons, but found also that the Appellants were disorderly, violent, aggressive, and committed acts of assaults and battery and vandalism, and destruction of property belonging to the eating establishments before Appellants were removed. Clearly *Hamm* would not compel an abatement of the prosecutions here—yet under the majority opinion, the finding of racial causes for the arrests would require the lower Court to dismiss the prosecutions, no matter what the conduct of the Appellants might have been.

Secondly, as Circuit Judge Bell points out so ably in his dissent, the Supreme Court of Georgia has abated a

group of sit-in convictions as a result of the *Hamm* decision. *Bolton et al.* v. *State,* No. 22,810, decided February 8, 1965. Counsel for Appellee insist that Judge Bell's partially dissenting opinion that Appellants should be required to prove in a hearing before the district court that Georgia Courts would not apply the teachings of *Hamm* fairly to them if the cases were remanded to the State Courts, and that the majority opinion involves jeopardy to our dual system of state and federal courts is the cor-
[fol. 68] rect law as to this aspect of the case. Of course, we do not feel that the cases should be remanded to the District Court at all, for the reasons heretofore set forth.

Ground XII

Appellee most respectfully insists that this Court erred in reversing the judgment of the lower Court and remanding the cause with directions, for all the reasons previously outlined in this Petition. The appeal should have been dismissed as untimely, in the first place. If considered on the merits, the remand order of the District Court was correct as a matter of law.

Motion for Rehearing En Banc

Pursuant to Rule 25 a of this Court, the State of Georgia, Appellee, respectfully moves this Court to order a rehearing en banc. This case is most complex, the issues of law are intricate and involved, and the final decision is highly important as legal precedent resolving a jurisdictional question between State and Federal Courts. The history of this case in the Federal Courts clearly reflects the extremely close legal questions involved, because there has been a wide divergence of opinion by the six distinguished and learned Federal Judges who have considered these issues. District Judge Sloan remanded the cases to the State Courts. On a hearing before a panel of the Fifth Circuit Court of Appeals, Chief Judge Tuttle and Circuit Judge Wisdom granted a stay of the remand order, but Dis-

trict Judge Carswell dissented, saying he would grant Appellee's motion to dismiss the appeal. Finally, when the case was decided on its merits on March 7, 1965, Chief Judge [fol. 69] Tuttle wrote the majority opinion, but Circuit Judge Bell and District Judge Whitehurst each dissented in part, with Judge Whitehurst saying he would dismiss the appeal as untimely, and Judge Bell disagreeing with the majority opinion as to the course to be followed by Judge Sloan upon remand of the case to the District Court.

Counsel for Appellee therefore feel justified in asking that all the Honorable Judges of the Fifth Circuit Court of Appeals sit in a rehearing in this case.

Respectfully submitted,

Eugene Cook, Attorney General of the State of Georgia;

Albert Sidney Johnson, Assistant Attorney General of the State of Georgia.

Judicial Building, Atlanta, Georgia 30303.

William T. Boyd, Solicitor General, Atlanta Judicial Circuit;

J. Robert Sparks, Assistant Solicitor General, Atlanta Judicial Circuit.

Fulton County Courthouse, Atlanta, Georgia 30303.
Counsel for Appellee.

[fol. 70]

CERTIFICATE OF SERVICE

Georgia, Fulton County

I, J. Robert Sparks, of counsel for the State of Georgia, Appellee, certify that I have this day served copies of the foregoing Petition for Rehearing En Banc, by depositing in the United States Post Office in Atlanta, Georgia two copies of same in an envelope addressed to Donold L. Hollowell and Howard Moore, Jr., Esquires, Attorneys at Law, 859½ Hunter Street, S.W., Atlanta, Georgia 30314, and two copies of same in an envelope addressed to Jack Greenberg, Esquire, Attorney at Law, 10 Columbus Circle, New York, New York 10019, counsel of record for Appellants, with sufficient first class postage affixed thereto.

I further certify that the foregoing Petition for Rehearing En Banc is presented in good faith and not for delay.

This 23rd day of March, 1965.

J. Robert Sparks, Assistant Solicitor General, Atlanta Judicial Circuit.

[fol. 71]

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 21354

THOMAS RACHEL, et al., Appellants,

versus

STATE OF GEORGIA, Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

PER CURIAM ORDER DENYING PETITION FOR REHEARING—April 19, 1965

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and WHITEHURST, District Judge.

It is Ordered that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby Denied.

[fol. 72] BELL, Circuit Judge, concurring in part and dissenting in part:

I would grant the petition for rehearing to the extent noted in my dissent to the original opinion and for that purpose I dissent from the denial of the petition for rehearing; otherwise I concur.

WHITEHURST, District Judge, dissenting:

I would grant the petition for rehearing for the reason that the Appellate Court has no jurisdiction by virtue of Rule 37(a)(2) of the F.R.C.P.

Per Curiam: It appearing that each of the members of the Court adheres to his views originally expressed in the several opinions heretofore filed, the petition for rehearing is Denied.

[fol. 73] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 74]

SUPREME COURT OF THE UNITED STATES

No. 147, October Term, 1965

GEORGIA, Petitioner,

v.

THOMAS RACHEL, et al.

ORDER ALLOWING CERTIORARI—October 11, 1965

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

INDEX

Page

Petition for Writ of Certiorari 1

Opinions Below 2

Jurisdiction 2

Questions Presented 3

Constitutional Provisions and Statutes Involved 6

Statement of the Case 7

Summary of Argument 10

Reasons for Granting the Writ 13

I. The Notice of Appeal of the Remand Order was not Timely Filed, and Petitioner's Timely Motion to Dismiss Appeal Should have Been Granted 13

II. The Petition for Removal does not Set Out any Valid Ground for Removal 16

III. Assuming Arguendo that Remand to the District Court for an Evidentiary Hearing was Proper, the Directions Given the Lower Court were Clearly Erroneous 24

Conclusion 28

Appendices ..... Ap. 1-Ap. 44

A. Order of Remand of the District Court ..... Ap. 1

B. Order of Court of Appeals Staying the Order of Remand ..... Ap. 7

C. Opinion of Court of Appeals Reversing the District Court ..... Ap. 9

INDEX (Continued)

Page

D. Opinion — Order of Court of Appeals Denying Rehearing ..... Ap. 29

E. Constitutional Provisions and Statutes Involved ..... Ap. 31

F. Judgment of Court of Appeals entered pursuant to opinion Reversing District Court ..... Ap. 42

G. Order of Court of Appeals Staying Mandate ..... Ap. 44

Certificate of Service ..... Ap. 45

CITATIONS

Cases

Arkansas v. Howard, D.C. E.D. Ark., 1963, 218 F. Supp. 626 19

Berman v. United States, 1964, 378 U. S. 530 16

Birmingham v. Croskey, D.C. N.D. Ala., 1963, 217 F. Supp. 947 23

Bolton v. State, 220 Ga. 632 ..... 11, 27

City of Clarksdale, Miss. v. Gertge, D.C. N.D. Miss., 1964, 237 F. Supp. 213 22

Gibson v. Mississippi, 1896, 162 U. S. 565 19

Griffin v. Maryland, 1964, 378 U. S. 130 25

Hamm v. City of Rock Hill, S. C., 1964, 379 U. S. 306 5

Hill v. Pennsylvania, D.C. W.D. Pa., 1960, 183 F. Supp. 126 19

INDEX (Continued)

Page

Hull v. Jackson County Circuit Court, 6 Cir., 1943, 138 F. 2d 820 19

Kentucky v. Powers, 1906, 201 U. S. 1 19

Maryland v. Soper, Judge, (No. 1), 1925, 270 U. S. 9 22

Murray v. Louisiana, 1896, 163 U. S. 101 19

Neal v. Delaware, 1880, 103 U. S. 370 19

North Carolina v. Jackson, D.C. M.D. N. C., 1955, 135 F. Supp. 682 19

Nye v. United States, 1941, 313 U. S. 28 13

Peterson v. City of Greenville, S. C., 1963, 373 U. S. 244 25

Shuttlesworth v. City of Birmingham, Ala., 1963, 373 U. S. 262 25

Smith v. Mississippi, 1896, 162 U. S. 592 19

Snypp v. Ohio, 6 Cir., 1934, 70 F. 2d 535, cert. den. 293 U. S. 563 19

Texas v. Doris, D.C. S.D. Texas, 1938, 165 F. Supp. 738 19

Thompson v. City of Louisville, 1962, 362 U. S. 199 25

United States v. Robinson, 1960, 361 U. S. 220 16

Virginia v. Rives, 1879, 100 U. S. 313 18

Williams v. Mississippi, 1898, 170 U. S. 213 19

INDEX (Continued)

Page

CONSTITUTION AND STATUTES

CONSTITUTION OF THE UNITED STATES:

First Amendment ..... Ap. 31

Fourteenth Amendment ..... Ap. 31

STATUTES AND RULES:

Act of 1866, Sec. 3 (14 Stat. 27, 28) ..... Ap. 36

Act of 1875, Sec. 5 (18 Stat. 472) ..... Ap. 35

Act of 1887, Secs. 2 & 5 (24 Stat. 553, 555) ..... Ap. 35

Act of February 24, 1933, (c. 119, 49 Stat. 904) 14

Act of June 25, 1948, c. 645, (62 Stat. 683) ..... Ap. 41

Ga. Code Annotated, 26-3005 ..... Ap. 40

Revised Statutes, Title XIII, the Judiciary, Sec. 641 ..... Ap. 37

Rule 37 (a) (2), Title 18, U. S. C. ..... Ap. 38

Rule 54 (a) (1) (b) (1), Title 18, U. S. C. ..... Ap. 40

Section 3731, Title 18, U. S. C. 13

Section 3732, Title 18, U. S. C. ..... Ap. 41

Section 1404, Title 18, U. S. C. 13

Civil Rights Act of 1964, Sec. 201, 203 ..... Ap. 41

Section 71, Former Title 28, U. S. C. (Judicial Code, Sec. 28) ..... Ap. 33

Section 74, Former Title 28, U. S. C. (Judicial Code, Sec. 31) ..... Ap. 33

INDEX (Continued)

Page

Section 76, Former Title 28, U. S. C. (Judicial Code, Sec. 33) ..... Ap. 34

Section 1443, Title 28, U. S. C. ..... Ap. 31

Section 1446 (a), (c), (d), Title 28, U. S. C. ..... Ap. 32

Section 1447 (c), (d), Title 28, U. S. C. ..... Ap. 32

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

NO._____

STATE OF GEORGIA,
Petitioner

v.

THOMAS RACHEL, et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The State of Georgia, Petitioner herein, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled case on March 5, 1965, rehearing denied on April 19, 1965, reversing the judgment of the United States District Court for the Northern District of Georgia, dated February 18, 1964, in which the District Court remanded to Fulton Superior Court twenty State of Georgia criminal prosecutions which had theretofore been removed to said District Court under the purported authority of the Civil Rights

Acts (28 U.S.C. 1443). The judgment sought to be reviewed reversed the remand order of the District Court in a divided opinion, two judges dissenting in part and concurring in part, and remanded the criminal prosecutions to the District Court with directions. A rehearing was denied by the same divided opinion of the same three judges of the Fifth Circuit panel which entered the judgment of March 5, 1965.

OPINIONS BELOW

The pertinent opinions of Courts below which affect the issues sought to be reviewed are as follows:

The opinion of the District Court dated February 18, 1964 is not reported, and appears in Appendix A, *infra*, Pages 1-6. An order of the Court of Appeals dated March 12, 1964, staying the remand order of the District Court, one judge dissenting, is not reported, and appears in Appendix B, *infra*, Pages 7-8. The opinion of the Court of Appeals dated March 5, 1965, two judges dissenting in part and concurring in part, is reported at 342 F. 2d 336, and appears in Appendix C, *infra*, Pages 9-28. The *per curiam* opinion of the Court of Appeals, one judge dissenting and another judge dissenting in part and concurring in part, dated April 19, 1965, denying a rehearing is not reported at this time, and appears in Appendix D, *infra*, Pages 29-30.

JURISDICTION

The opinion of the Fifth Circuit Court of Appeals was entered on March 5, 1965 (Appendix C, *infra*, Pages 9-28) and the judgment was entered on March 5, 1965 (Appendix F, *infra*, Page 42). The opinion-order of the Court of Appeals denying a rehearing was entered

on April 19, 1965 (Appendix D, *infra*, Pages 29-30). A 30-day Stay of Mandate was granted by the Court of Appeals on April 27, 1965 (App. G, Page 44). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED

I. Whether a Notice of Appeal from an order of remand of the District Court entered in twenty State Court criminal prosecutions theretofore removed to said District Court under the purported authority of 28 U.S.C. 1443 is timely, where said Notice of Appeal was not filed within ten days from the entry of said remand order, as required by Rule 37 (a)(2), Fed. R. Crim. P.

Other subsidiary questions fairly comprised within Question I are:

(a) Did the majority of the Court of Appeals err in holding that the ten day time limit for filing a notice of appeal prescribed by Rule 37 (a) (2), Fed. R. Crim. P., has no application to this case because, as held by the majority of the Court, that Rule applies only to criminal appeals after verdict, or finding of guilt, or plea of guilty?

(b) Is not Rule 37 (a) (2) specifically made applicable to an appeal of a remand order entered in a removed criminal case by the provision of Rule 54 (b) (1), Fed. R. Crim. P. that the Criminal Rules apply to criminal prosecutions removed to the United States District Courts from state courts and govern all procedure after removal, except dismissal?

(c) Did the Court of Appeals have jurisdiction to

entertain the appeal where the Notice of Appeal of the order of remand was filed sixteen days after the entry of the remand order, and should not Petitioner's timely Motion to Dismiss Appeal on the grounds that the Notice of Appeal was not timely filed have been granted?

II. Assuming *arguendo* that Question I is decided adversely to Petitioner and the merits of the judgment of the Court of Appeals is reached, the following question is presented: Whether the Petition for Removal, which does not allege that any Georgia statute is unconstitutional and does not specifically allege a denial of the equal rights of the Respondents by virtue of the State statute under which they were being prosecuted in the State Court, sets forth a valid ground for removal under Section 1443, Title 28, U.S.C.

Other subsidiary questions fairly comprised within Question II are:

(a) Did the Court of Appeals err in holding that a Petition for Removal need contain only the "bare bones allegation of the existence of a right"; that the instant Petition for Removal did in fact allege the denial of protected rights by State legislation; and that the Petition for Removal adequately alleged that the Respondents suffered a denial of equal rights by virtue of the statute under which they were being prosecuted in the State Court?

(b) Whether the Respondents are entitled to a hearing in a federal forum for the purpose of proving a denial of their rights under a law providing for their equal rights because of State legislation, under the meager allegations of the "notice-type" pleading in their Petition

for Removal, and whether the District Court erred in remanding said cases to the State Court upon consideration of the allegations of the Petition for Removal alone, without ordering an evidentiary hearing.

III. Whether the majority of the Court of Appeals erred in reversing the remand order of the District Court and remanding the cases to said District Court with directions to hold a hearing, and in further holding that, if, upon such a hearing, it is established that the removal of the Respondents from the various places of public accommodation was done for racial reasons, it would become the duty of the District Court to order a dismissal of the prosecutions without further proceedings, under the holding of *Hamm* v. *City of Rock Hill*, 1964, 379 U. S. 306, 85 S. Ct. 384.

Other subsidiary questions fairly comprised within Question III are:

(a) Did the aforesaid directions by the majority of the Court of Appeals to the District Court misconstrue and expand the doctrine of *Hamm, supra,* to mean that all criminal prosecutions arising from removal of persons for racial reasons from places of public accommodation must be abated, without regard to any possible evidence as to the peaceful or nonpeaceful conduct of the particular Respondents involved, and did the aforesaid directions unduly limit the discretion of the District Court in deciding whether the *Hamm* decision was controlling or was distinguishable on other grounds based on the possible evidence adduced at the hearing?

(b) Did the majority of the Court of Appeals err in

remanding the case to the District Court with the directions aforesaid, without requiring the removing Respondents to prove in the hearing that the teachings of *Hamm* would not be applied fairly to them by the Georgia Courts if the prosecutions were remanded to the State courts?

(c) Did the majority of the Court of Appeals err in failing to affirm the District Court's order of remand, thus allowing the Courts of Georgia to apply the doctrine of the *Hamm* decision, rendered subsequent to the removal of these cases, to these prosecutions?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States of America are involved.

The statutes involved are the following:

(1) Sections 1443 (1) (2); 1446 (a), (c), (d); and 1447 (c) and (d), Title 28, U. S. C. (62 Stat. 938, 1948; 63 Stat. 102, 1949).

(2) Former Sections 71, 74, 76, former Title 28, U. S. C. (March 3, 1911, 36 Stat. 1094, 1096, 1097).

(3) Act of 1866 (14 Stat. 27, 28).

(4) Act of 1875 (18 Stat. 470, 472).

(5) Act of 1887 (24 Stat. 553, 555).

(6) Georgia Code Annotated, 26-3005 (Ga. Laws 1960, pages 142 and 143).

(7) Rules 37 (a) (2), 54 (a) (b) (1) and 45 (a), Title 18, U. S. C.

(8) Rule 73 (a), Title 28, U. S. C.

(9) Revised Statutes, Title XIII, the Judiciary, Sec. 641.

(10) Civil Rights Act of 1964, Secs. 201 (b) (2) and 203.

(11) Act of June 25, 1948, codifying and enacting Title 18, U. S. Code c. 645, 62 Stat., 683, page 845.

The constitutional provisions and statutes involved being somewhat lengthy, their pertinent text is set out in Appendix E for Petitioner, as authorized by Rule 23 (1) (d) of this Court, Pages 31-41.

STATEMENT OF THE CASE

On August 2, 1963, a Grand Jury of Fulton Superior Court, Atlanta, Georgia, indicted Thomas Rachel and 19 other defendants in separate indictments for violations of Georgia Laws, 1960, pages 142 and 143, a misdemeanor. This statute is codified as 26-3005, Georgia Code Annotated (App. E, Page 40).

The misdemeanor with which Thomas Rachel was charged was his failure and refusal, on June 17, 1963, to leave the premises of another, to-wit, Lebco, Inc., doing business under the name of Lebs on Luckie Street after having been requested to leave said premises by the person in charge.

The indictments returned against the other 19 defendants, who are now Respondents herein, involved here contained identical allegations to the Rachel indictment with the exception that in some instances the misdemeanor was alleged to have been committed on another date and at a different restaurant in Fulton County, Georgia.

On February 17, 1964, the Respondent Rachel and the 19 other Respondents filed a Petition for Removal in the United States District Court for the Northern District of Georgia, under the purported authority of Sections 1443 (1) (2) and 1446, Title 28, U. S. C. (R. 2-9)

Briefly stated, the removal petition alleged that the State of Georgia by statute was perpetuating customs and serving members of the Negro race in places of public accommodation on a racially discriminatory basis, and on terms and conditions not imposed on the white race. They further alleged that they were being prosecuted for acts done under color of authority derived from the Constitution and laws of the United States, and for refusing to do an act inconsistent therewith. (R. 2-9)

The next day after filing of the removal petition, i.e., on February 18, 1964, United States District Judge Boyd Sloan issued an opinion and order remanding said cases to Fulton Superior Court, stating in part, "the petition for removal to this Court does not allege facts sufficient to justify the removal which has been effected." (R. 10-15; App. A, Pages 1-6.)

On March 5, 1964, the Respondents filed a Notice of Appeal from the order of remand to the Fifth Circuit Court of Appeals. (R. 16)

The Respondents filed with the Fifth Circuit Court of Appeals a Motion for Stay Pending Appeal, on March 12, 1964.

On March 12, 1964, a hearing was held before a three Judge panel of the Fifth Circuit Court of Appeals on

the motion for stay of the remand order of the District Court. Petitioner, the State of Georgia, filed a Motion to Dismiss Appeal on two grounds. (1) that the remand order of the District Court was not reviewable on appeal or otherwise, and (2) the Notice of Appeal was not timely filed, having been filed more than ten days from the date of the remand order. (R. 26-30)

After an oral hearing, the majority of the Fifth Circuit Court of Appeals by a 2 - 1 division granted the stay. District Judge G. Harrold Carswell, Northern District of Florida, dissented, saying, "I would, therefore, grant appellee's motion to dismiss." (App. B, Pages 7-8)

Thereafter, after extensive oral argument before the Court of Appeals, said Court on March 5, 1965, entered an opinion by a divided three-judge Court reversing the judgment of the District Court, and remanding the case to the lower Court with instructions to hold a hearing and to dismiss the prosecutions, if it is established that the removal of the Respondents from the various places of public accommodation was done for racial reasons. (R. 42-61; App. C, Pages 9-28) Two Judges dissented in part and concurred in part.

A timely Petition for Rehearing En Banc was filed by the State of Georgia, Petitioner (R. 63-78) and was denied in a *per curiam* opinion of the Court of Appeals entered on April 19, 1965, with one Judge dissenting and another Judge dissenting in part and concurring in part (R. 79-80; App. D, Pages 29-30). A 30-day Stay of Mandate was granted by the Court of Appeals on April 27, 1965 on application of Petitioner pending submission of this Petition for Writ of Certiorari. (Appendix G, Page 44)

The jurisdiction of the Court of first instance, the United States District Court for the Northern District of Georgia, was invoked by the removing Respondents under the purported authority of Sections 1443 and 1446 (c) (d), Title 28, U.S.C. (R. 6, 7)

SUMMARY OF ARGUMENT

Only three very basic and important reasons for granting the Writ are urged by Petitioner. First, the Court of Appeals had no jurisdiction to consider the appeal, inasmuch as the Notice of Appeal of the order of remand was filed six days too late. The majority of the Court of Appeals has held, in the first opinion known to counsel for Petitioner since the 1948 enactment of Title 18, U.S.C., that the ten-day time limit of Rule 37 (a) (2), Fed. R. Crim. P. for filing a notice of appeal from an order in a criminal case applies only to criminal appeals after verdict, or finding of guilt, or plea of guilty. This novel construction of one of the basic Criminal Rules originally promulgated by this Honorable Court and subsequently incorporated by reference in an Act of Congress in 1948, alone would warrant the granting of the Writ. One Judge of the panel dissented on this ground alone both in the opinion on the merits and on the petition for rehearing. This construction of the Rule was never urged by the Respondents in their briefs or argument before the Court of Appeals.

Secondly, the Petition for Removal completely fails, according to all federal judicial precedent, to set out a valid ground for removing State prosecutions to a federal district court for trial. Petitioner urges that there is no requirement for a hearing of the allegations of the removal petition and that removability must stand or fall

upon the allegations of the petition. All federal case precedent, including that of this Honorable Court, support this position, and Petitioner strongly maintains that no error was committed by the District Court in remanding the cases without an evidentiary hearing.

Finally, even if Petitioner's first two grounds are decided adversely to us, the Writ should be granted because the majority of the Court of Appeals has directed the District Court to look for only one criteria on the hearing, and to dismiss the *State Court prosecutions* if that single element is found from the evidence. That element is, of course, the finding that racial reasons were the cause of the removal of the *Rachel, et al,* defendants from the various restaurants. This virtual mandate to the District Court unduly limits his judicial discretion in considering whether or not the prosecutions are in fact controlled by *Hamm,* supra. Many distinguishing factors might be raised by the evidence on such a hearing. Were the defendants peaceable and non-violent in their demonstrations? Were the restaurants places of public accomodation coming under the purview of the Civil Rights Act of 1964? Under the directions of the Court of Appeals, the District Court could consider none of these factors, if the racial factor alone were found.

Further, the Court of Appeals by its remand to the District Court with directions ignores the fact that the Supreme Court of Georgia has recognized and followed the *Hamm* decision and has abated five similar State Court prosecutions. *Bolton, et al* v. *State of Georgia,* 220 Ga. 632, decided February 8, 1965. The *Hamm* case had not been decided when these (*Rachel, et al*) prose-

cutions were pending in the Georgia Courts, and the Georgia Courts have not had an opportunity to consider these cases in connection with the *Hamm* doctrine. They should be afforded that opportunity, as pointed out by Circuit Judge Bell in his partial dissent (R. 60, App. C., Page 27). The action of the majority of the Court of Appeals amounts to a finding that the Courts of Georgia will not apply *Hamm* fairly to these Respondents before such courts have even been given the opportunity to do so. This casual treatment of the Georgia Courts involves jeopardy to our dual system of courts, state and federal, as pointed out by Circuit Judge Bell. Petitioner feels that, if these cases are remanded to the District Court for a hearing, contrary to Petitioner's other grounds, *at the very least* these Respondents should be required to prove that the Georgia Courts will not treat them fairly, in the light of *Hamm*. If they cannot prove this, the cases should be remanded to the State Courts. The District Court should not have its hands tied by the erroneous directions of the majority of the Court of Appeals, in limiting the hearing to one issue only.

Counsel for Petitioner are not concerned in this petition with the merits of the State Court prosecutions against these Respondents, and as to the eventual outcome of same if they are remanded to the State Courts. We *are* deeply concerned with the grave and highly important constitutional question of whether a federal appellate court should accept jurisdiction over State Court criminal prosecutions and virtually order dismissal of the actions, without ever giving the State Courts a chance to reconsider the cases in the light of the latest decision from this Honorable Court. Particularly is this so in view of the *Bolton* decision by the highest Court

of Georgia, which proves conclusively that Georgia Courts are following the decisions of the United States Supreme Court in racial controversies.

For the foregoing reasons, Petitioner respectfully insists that the Petition for Writ of Certiorari to the Fifth Circuit Court of Appeals should be granted.

REASONS FOR GRANTING THE WRIT

I. The Notice of Appeal of the Remand Order was not timely filed, and Petitioner's timely Motion to Dismiss Appeal should have been granted.

The majority of the Court of Appeals, with Judge Whitehurst dissenting, held that Rule 37 (a) (2) applies only to criminal appeals "after verdict, or finding of guilt . . . or plea of guilty," citing *Nye* v. *United States*, 1941, 313 U. S. 28, 43-44. Therefore, the Court held that the notice of appeal was timely, even though filed sixteen days after entry of the remand order. Petitioner respectfully maintains that this was erroneous.

(a) Rule 37 (a) (2) controls the time limit for filing a notice of appeal in a criminal case both before and after verdict.

The language of Rule 37 (a) (2), which is a single paragraph, clearly refutes the reasoning of the Court of Appeals. The last sentence allows 30 days for an appeal by the government when authorized by statute. The government may appeal *before verdict* in criminal cases (1) an order suppressing evidence in a narcotics case. (18 U.S.C. 1404) and (2) a decision dismissing an indictment or sustaining a motion in bar, *where the defendant has not been put in jeopardy*. (18 U.S.C. 3731.)

Only in rare instances where a judgment of conviction has been arrested based on invalidity or construction of the statute can the government appeal *after* verdict in a criminal case. If Rule 37 (a) (2) applies only to "after verdict" judgments and orders, why does the last sentence of that Rule deal with the government's "before verdict" appeals? The ruling of the Court of Appeals makes the last sentence of that Rule a complete nullity. It splits a single paragraph into two parts — the first dealing with "after verdict" appeals by defendants and the latter prescribing a different time limit for both "before" and "after" verdict appeals by the government. This is a far-fetched construction of the Rule, and one which was never urged even by the Respondents before the Court of Appeals.

The *Nye* case, supra, is not controlling. It was decided in 1941, and was not a criminal case, but an adjudication of criminal contempt arising out of a civil case. The main thrust of the decision was that "the categories of cases embraced in the rules cannot be expanded by interpretation to include this type of case." 313 U. S. at Page 45. In *Nye*, the Court was interpreting Rule III, effective September 1, 1934 (292 U. S. 661) under the "after verdict" enabling Act of February 24, 1933, (c. 119, 49 Stat. 904, as amended). Since that time, the Old Rule III has been superseded by Rule 37, prepared by the Advisory Committee of this Court which also prepared Rules 1-31, 40-60. This Court by order dated February 6, 1946, directed that all the Rules (1 through 60) be consecutively numbered, indexed, and given their title. 327 U. S. 827. It is inconceivable that the Advisory Committee would have left Rules 32-39 applicable only to "after verdict" judgments while balance of the Rules

applied to both "before" and "after" verdict judgments, or that this Court in promulgating all of the Rules in the same order intended any such result.

Finally, the Court of Appeals based its ruling in large part on the assertion that Rule 37 (a) (2) had never been presented to Congress. The Court of Appeals overlooked the fact that when Congress enacted the Act of June 25, 1948, (c. 645, 62 Stat. 683) entitled "An Act to Revise, Codify, and Enact into Positive Law Title 18 of the United States Code" on page 845 of that statute, under Section 3732, Rule 37 (a) is incorporated by reference. (See Appendix E, Page 41.)

Finally, we point out that the Court of Appeals, while holding that Rule 37 (a) (2) was not applicable, failed to state in its opinion what other Rule or statute would control the time limit for a notice of appeal in the instant case. Certainly we cannot go to the Federal Rules of Civil Procedure for an answer, because this is not a civil case.

(b) Rule 54, (a) (1), (b) (1), Fed. R. Crim. P. specifically makes Rule 37 (a) (2) applicable to the instant case.

The first sentence of Rule 54 (a) (1) makes "these rules" applicable to *all* criminal proceedings in the United States District Courts. Rule 54 (b) (1) specifically provides that "these rules" apply to criminal prosecutions removed to U. S. district courts from state courts and "govern all procedure after removal" except dismissal. (Appendix E, Page 40.) The phrase "govern *all* procedure after removal" must certainly include appeal of remand orders. No remand order can issue until after

a case is removed from state to federal court. Rule 54 was promulgated by this Court on the same day as Rule 37, as previously pointed out. Therefore, counsel for Petitioner insist that to hold that Rule 37 does not apply to an appeal of a remand order in a criminal case flies into the teeth of Rule 54, both generally and specifically. Rule 54 in its broad application applies the Criminal Rules to *all* criminal proceedings in district courts and then in precise language applies the Rules to this exact type of case.

(c) For the foregoing reasons, the Court of Appeals erred in holding this appeal to be timely. A notice of appeal in a criminal case not filed within the ten-day time limit prescribed by Rule 37 (a) (2) confers no jurisdiction upon the Court of Appeals. *United States* v. *Robinson*, 1960, 361 U. S. 220; *Berman* v. *United States*, 1964, 378 U. S. 530. Therefore, Petitioner's timely Motion to Dismiss Appeal should have been granted.

II. The Petition for Removal does not set out any valid ground for removal.

(a) There is nothing in the Petition for Removal to warrant the exercise of Federal jurisdiction.

Petitioner respectfully maintains that the Petition for Removal is completely devoid of any valid ground for removal of these criminal prosecutions from State to Federal court. What it *does not contain* is more important than the skimpy allegations set forth. The Petition for Removal (R. 2-7) does *not* allege (1) that any statute or law of the State of Georgia is unconstitutional (2) that any civil right, or the enforcement thereof, of Respondents is destroyed by any statute of the State of

Georgia or by its Constitution (3) that any statute of the State of Georgia, or its Constitution creates an inability on the part of Respondents to enforce in the Courts of Georgia their equal civil rights under the United States Constitution.

Furthermore, there is a complete failure in the Petition for Removal to set out sufficient *facts* to support a removal. Only bare allegations are made that certain Respondents sought service, food, entertainment and comfort in certain restaurants and hotels in Atlanta, Georgia, and were arrested pursuant to Georgia Code Annotated 26-3005. Then appears a mere conclusionary allegation that these arrests were effected for the sole purpose of perpetuating customs and usages of the City of Atlanta with respect to serving and seating Negroes, and white persons accompanying Negroes, in places of public accommodation upon a racially discriminatory basis. They allege, in a pure conclusion, that they cannot enforce their rights in the Georgia courts, but do not allege a single *fact* showing why they cannot do so. They do not specify one single Georgia law which prevents enforcement of their rights in the State courts. Moreover, they do not allege that any judge, law enforcement officer, prosecuting attorney, or other officer of the State of Georgia has in any way violated any of their civil rights, or prevented them from asserting any of such rights. In other words, there is no allegation of improper conduct by any State official. Even if such allegations *were* contained in the Petition for Removal, many federal decisions hold that such allegations would not justify removal. This woefully inadequate removal petition was everything that the District Court had before him when he considered, on his own motion as it was his duty

to do, the question of whether a cause for removal was shown.

Petitioner will discuss briefly just a few of the controlling cases which illustrate beyond the shadow of a doubt that this case is not removable under any possible construction of the Petition for Removal.

In *Virginia* v. *Rives,* 1879, 100 U. S. 313, where two Negroes removed their pending State trial for murder to federal court, and the State of Virginia filed a petition for mandamus to the United States Supreme Court to force the remand of said cases, Justice Strong said, in part, for the Court, in granting the petition for mandamus:

> "... *But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him.* When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to remove his case. By the express requirement of the statute his *petition must set forth the facts upon which he bases his claim to have his case removed,* and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial." (Emphasis added)

Virginia v. *Rives,* supra, holds categorically that a case is not removable under the civil rights acts (the predecessor of 28 U.S.C. 1443) unless a State Constitution or Statute on its face denies the removing defendant his

federal constitutional rights. In other words, there must be *discriminatory state legislation* depriving him of those rights before he can remove the case. Since that time, federal courts have followed that rule without deviation or modification. To list just a few, Appellee cites *Kentucky* v. *Powers*, 1906, 201 U. S. 1; *Williams* v. *Mississippi*, 1898, 170 U. S. 213; *Murray* v. *Louisiana*, 1896, 163 U. S. 101; *Gibson* v. *Mississippi*, 1896, 162 U. S. 565; *Smith* v. *Mississippi*, 1896, 162 U. S. 592; *Hull v. Jackson County Circuit Court*, 6 Cir., 1943, 138 F. 2d 820; *Snypp* v. *Ohio*, 6 Cir. 1934, 70 F. 2d 535, cert. den. 293 U. S. 563; *Arkansas* v. *Howard*, D.C. E.D. Ark., 1963, 218 F. Supp. 626; *North Carolina* v. *Jackson*, D.C. M.D. N.C., 1955, 135 F. Supp. 682; *Hill* v. *Pennsylvania*, D.C. W.D. Pa., 1960, 183 F. Supp. 126; *Texas* v. *Doris*, D.C. S.D. Texas, 1938, 165 F. Supp. 738; and *Neal* v. *Delaware*, 1880, 103 U. S. 370. Each of the foregoing was a criminal case, and removal was sought in each under the civil rights acts.

The *Kentucky* v. *Powers* case, supra, appears to be the last Supreme Court ruling on exactly what grounds will authorize a removal under color of the civil rights acts, and it has been followed in every instance by the lower federal courts in the cases previously cited in this section of this Petition. In *Powers*, supra, the Supreme Court said, (201 U. S. at page 30):

> "The question as to the scope of section 641 of the Revised Statutes again rose in the subsequent cases of *Neal* v. *Delaware*, 103 U. S. 370, 386; *Bush* v. *Kentucky*, 107 U. S. 110, 116; *Gibson v. Mississippi*, 162 U. S. 565, 581, 584, and *Charley Smith* v. *Mississippi*, 162 U. S. 592, 600. In each of these cases it was distinctly adjudged, in harmony with previous

cases, that the words in section 641 — 'who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States' — did not give the right of *removal*, unless the constitution or the laws of the State in which the criminal prosecution was pending denied or prevented the enforcement in the judicial tribunals of such State of the equal rights of the accused as secured by any law of the United States. Those cases, as did the prior ones, expressly held that there was no right of *removal* under section 641, where the alleged discrimination against the accused, in respect of his equal rights, was due to the illegal or corrupt acts of administrative officers, unauthorized by the constitution or laws of the State, as interpreted by its highest court. For wrongs of that character the remedy, it was held, is in the state court, and ultimately in the power of this court, upon writ of error, to protect any right secured or granted to an accused by the Constitution or laws of the United States, and which has been denied to him in the highest court of the State in which the decision, in respect of that right, could be had."

Petitioner maintains that the *Powers* case still controls the federal case law on this question of removability, and that it has not been altered, modified, or watered-down by any subsequent decision of the Supreme Court, or any inferior federal court.

Thus, Petitioner has clearly shown that according to prevailing federal case law *discriminatory state legislation* which *interferes* with a constitutional right of defense by the defendant must exist before a case is removable

under the civil rights acts. The Respondents' Petition for Removal does not allege this. The only statute they mention is Georgia Code Annotated, 26-3005, which simply makes it unlawful for any person who is on the premises of another to refuse and fail to leave said premises when requested to do so by the owner or other person in charge of said premises. There is nothing discriminatory about that statute, and nothing which in any manner deprives a defendant of any right of defense. The statute on its face has application to many situations other than racial ones. It authorizes prosecution of the drunken visitor in one's home, the person behaving in a disorderly manner in one's church, or the disreputably dressed, boisterous customer in a store, who refuses to leave when requested. If the gist of Respondents' complaint is that 26-3005 is being *unconstitutionally applied*, then they have no grounds for removal. Their remedy is to defend themselves through the State courts and then seek review by certiorari in the United States Supreme Court.

The Court of Appeals in their opinion impliedly recognize the lack of sufficient allegations in the removal petition. The majority refers to "the bare bones allegation of the existence of a right," and to "liberality of pleadings under the (Civil) rules." Circuit Judge Bell refers in his partially concurring and partially dissenting opinion to the removal petition as "notice type pleadings." In fact, the whole Court agreed to send the case back to the District Court to allow Respondents to prove the allegations of the removal petition, or as Judge Bell stated "to determine just what appellants do claim." (R. 60, App. C, Page 27.)

Finally, we direct the Court's attention to the very able, thorough and scholarly opinion of United States District Judge Clayton, Northern District of Mississippi, in *City of Clarksdale, Miss.* v. *Gertge,* 1964, 237 F. Supp. 213, in which he remanded to the State courts a removed prosecution arising from racial incidents in which the removal petition was far more detailed as to alleged denial of federally protected rights in Mississippi courts than is the removal petition in the instant case. Judge Clayton concluded that removal was not justified under either sub-section (1) or (2), of Section 1443, Title 28, U.S.C. He *did not hold a hearing,* but rendered his opinion on briefs directed to the *face of the pleadings.* His opinion in that case is even more applicable to the instant case, where the removal petition is so much more inadequate.

(b) The removal petition must stand or fall upon its allegations alone, and there is no requirement for a district court to hold an evidentiary hearing.

The Court of Appeals held that the district court should have held a hearing, to allow the Respondents to prove their allegations and remanded the case to the District Court for such a hearing. Petitioner maintains that this was error. We find no legal precedent for such action. Removal petitions are considered on their face, by the factual allegations.

In *Maryland* v. *Soper, Judge,* (No. 1) 1925, 270 U. S. 9, the Supreme Court said:

> "We think the *averments of the amended petition* in this case are not sufficiently informing and specific to make a case for removal under Sec. 33." (at page 34)

. . . . . .

"*These averments* amount to little more than to say that the homicide on account of which they are charged with murder was at a time when they were engaged in performing their official duty . . . (at page 35) . . . . . .

". . . But they (the removing defendants) should do more than this in order to satisfy the statute (Section 33, Judicial Code, formerly Section 643, Revised Statutes). In order to justify so exceptional a procedure (removal of criminal cases to federal court), the person seeking the benefit of it should be candid, specific, and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer. As the defendants *in their statement* have not clearly fulfilled this requirement, *we must grant the writ of mandamus directing the District Judge to remand the indictment and prosecution*. Should the District Judge deem it proper *to allow another amendment to the petition for removal*, by which the *averments necessary* to bring the case within Sec. 33 are supplied, he will be at liberty to do so. Otherwise the prosecution is to be remanded as upon a peremptory writ." (Italics and explanatory words in parenthesis added.)

Petitioner thus maintains that the removability of a case depends on the allegations of the removal petition itself. For example, in *Birmingham* v. *Croskey*, D.C. N.D. Ala., 1963, 217 F. Supp. 947, the Courts' opinion does not mention *any* evidentiary hearing, and reads in brief portions as follows (217 F. Supp. 950-51):

"As will become readily apparent, the foregoing *allegations* (of the removal petition) are insufficient to justify the removal of the case to this Court" (at page 950) and "Considered in the light of the

> aforementioned authority, the *petition for removal* to this Court *does not allege* facts sufficient to justify the removal that has been granted" (at the bottom of page 950 and top of page 951).

In other cases where remand was ordered, the following excerpts illustrate our point:

> "The *petition* is probably insufficient also for the reasons, etc." (*North Carolina* v. *Jackson*, supra at page 683); "Otherwise stated, even if the *material factual allegations of the petition* are accepted at face value, the Court is not convinced, etc." (*Arkansas* v. *Howard*, supra, at page 633.)

Appellee could quote similar language from many other cases, showing that the allegations of the removal petitions are the only matters considered by federal district courts, and that evidentiary hearings are not required or even indicated, but we feel it is unnecessary.

If District Courts are required to hold prolonged and detailed hearings every time an inadequate removal petition is filed, the work load of such Courts will be greatly increased. Such petitions should be, and have been in the past, considered strictly in the light of the facts alleged therein. Therefore, the District Court properly remanded the case without a hearing.

III. Assuming arguendo that remand to the District Court for an evidentiary hearing was proper, the directions given the lower court were clearly erroneous.

The majority of the Court of Appeals directed the lower court to dismiss the prosecutions, if upon the hearing it appeared that racial reasons were the cause of Respondents' removal from the various restaurants.

No discretion whatever was left to the District Court by these directions, except to make a finding of fact as to that one issue.

(a) The aforesaid directions to the lower court unduly limited the judicial discretion of that Court in applying the evidence to the doctrine of Hamm v. City of Rock Hill.

As Circuit Judge Bell points out (App. C, Page 26; R. 59), such a holding is tantamount to applying *Hamm* in all its sweep against trespass statutes, retroactively to the State of Georgia, and is in effect a holding that Georgia has applied and will continue to apply its trespass statute contrary to the teachings of this Honorable Court in *Hamm*, even though *Hamm* had not been decided when the cases were in the State Courts, and even though those State Courts have not had an opportunity to deal with these cases in the light of *Hamm*.

This holding assumes that *any* trespass prosecution growing out of racial causes is automatically abated by *Hamm*. *Hamm* does not hold this. It is strictly limited to peaceful and non-violent attempts to exercise a right to be served in places of public accommodation, without regard to race, color or creed. A number of recent Supreme Court decisions have also stressed the peaceful and non-violent actions of defendants prosecuted in various types of "sit-in" demonstrations. These cases are *Thompson* v. *City of Louisville*, 1962, 362 U. S. 199; *Shuttlesworth* v. *City of Birmingham, Ala.*, 1963, 373 U. S. 262; *Peterson* v. *City of Greenville, S. C.*, 1963, 373 U. S. 244; and *Griffin* v. *Maryland*, 1964, 378 U. S. 130. If the evidence should show violence or vandalism

on the part of Respondents, *Hamm* would not be applicable.

Another issue which might arise from the evidence in a hearing is whether or not any one of the restaurants involved is in fact a place of public accommodation within the meaning of the Civil Rights Act of 1964. The District Court should be allowed to determine these matters upon the evidence, and not be restricted to one issue as he is at present under the majority decision of the Court of Appeals.

(b) The District Court's remand order should have been affirmed, and the criminal prosecutions returned to Fulton Superior Court, thus allowing the Courts of Georgia to consider the cases in the light of the Hamm decision.

Counsel for Petitioner respectfully submit that the Court of Appeals has gone one step further than this Honorable Court has ever done, in returning the cases to the District Court with directions to dismiss same if one specific finding, i.e., racial causes for the arrests of Respondents, is made. This wrests jurisdiction of the cases from the Georgia Courts without giving them a chance to apply the latest ruling of this Honorable Court. And there is not a single allegation in the Petition for Removal which indicates that the Respondents will not be treated completely fairly in the Georgia Courts, in the light of *Hamm*. Counsel for Petitioner agree with Circuit Judge Bell's opinion that Respondents should be required to show that Georgia Courts will not apply *Hamm* fairly to them. If they fail to do this, the cases should be remanded to the State courts.

Any possible conjecture that Georgia Courts will not fairly apply the doctrine of *Hamm* to any and all defendants similarly situated to these Respondents should have been laid to rest in the case of *Bolton* v. *State,* 1965, 220 Ga. 632. The Negro defendants in *Bolton,* supra, were convicted for violation of the same anti-trespass law involved in the instant case, for sitting down in, and refusing to leave a public eating place in Athens, Georgia, after having been refused service. The Supreme Court of Georgia, in reversing the convictions, said in part, in a unanimous opinion:

> ". . . So applying the rules of Sec. 201 (b) (2), (c) of the Civil Rights Act of 1964 to the facts of this case, we find and hold that this public eating place offers to serve interstate travelers and under the majority holding of the Supreme Court of the United States in *Hamm* v. *City of Rock Hill* (*South Carolina*), and *Lupper* v. *State of Arkansas,* 379 U. S. 306 (13 L.E. 2d 300), both of which were decided in one opinion on December 14, 1964, these convictions must be vacated and the prosecutions dismissed, notwithstanding the offense charged against each of these defendants was committed and convictions therefor were obtained prior to the passage of the Civil Rights Act of 1964. In those two cases the majority held that the Civil Rights Act of 1964 forbids discrimination in specified places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. While those majority holdings do not accord with our conception of the meaning and purpose of the provisions of the Constitution of this State and the Constitution of the United States which prohibit the enactment of ex post facto or retroactive laws (Code Sec. 1-128, 2-302), we are, under our oaths, nevertheless required to follow them and we will therefore do so in these cases; and

being so required, *we therefore hold that these pending convictions are abated by the 1964 Civil Rights Act* and it is ordered that the sentences imposed on each of these defendants be vacated *and that the charge against each defendant be dismissed.*" (Italics added)

Counsel for Petitioner most respectfully insist that the Georgia Courts should be afforded an equal opportunity to rule on these cases, unless Respondents can show that their equal rights will be denied them in the Georgia Courts.

CONCLUSION

As stated in our summary of argument, counsel for Petitioner are not concerned in this case with the future of these cases if they are remanded to State courts. The issue of whether these cases are *removable to federal courts* and whether the appeal *was timely* are the only questions presented. We feel they are of sufficient importance to warrant the issuance of the Writ of Certiorari. To our knowledge, this is the first time the issue of removability of criminal prosecutions from State to federal court in light of the Civil Rights Act of 1964 has been presented to this Court. It is an important question of federal law which has not been, but should be, decided by this Honorable Court. The unusual construction by the Court of Appeals of one of the jurisdictional Rules of Criminal Procedure promulgated by this Court, (Rule 37 (a) (2)) is important enough alone to warrant the issuance of the Writ.

Finally, there has been a wide disparity of views of Federal Judges during the course of this case in the lower federal courts. The District Judge remanded the cases. One Judge dissented from the Order staying the

remand order. Two Judges dissented in part and concurred in part in both the opinion of the Fifth Circuit Court of Appeals on the merits, and in the opinion of that Court denying a rehearing. This Court should resolve these conflicting views with finality.

For the foregoing reasons, Petitioner respectfully urges this Court to grant the Petition for Writ of Certiorari and review the judgment of the Fifth Circuit Court of Appeals.

Respectfully submitted,

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APPENDIX A

APPENDIX A — ORDER OF REMAND

(Filed in Clerk's Office February 18, 1964, B. G. Nash, Clerk. By: Mary Roper, Deputy Clerk.)

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

NO. 23,869

THE STATE OF GEORGIA

v.

THOMAS RACHEL, JERRY WALKER, LARRY CRAWFORD FOX, DEBBIE AMIS, WILLIE PAUL BERRIEN, JR., LYNN PFUHL, MICHAEL SAYER, JULIAN M. SAMSTEIN, RALPH M. MOORE, RONALD FRANKLIN TURNER, CARL C. ARNOLD, JAMES F. THOMPSON, ARCHER COLUMBUS BLACK, CARL VINCENT HILL, JEANETTE STOCKTON HUME, JAMES ARTHUR CHERRY, RUSSELL C. CAMPBELL, ALLEN R. ELLIOTT, ANNA JO WEAVER, AND CHARLES EDWARD WELLS

CRIMINAL

In a petition for removal verified by counsel, filed in this Court on February 17, 1964, by the above named defendants, the petitioners allege:

That they are presently at liberty on bail on a charge of having violated Title 26, Georgia Code Annotated, § 3005; that they were arrested by members of the Police Department of the City of Atlanta and that "their

arrests were effected for the sole purpose of aiding, abetting, and perpetuating customs, and usages which have deep historical and psychological roots in the mores and attitudes which exist in the City of Atlanta with respect to serving and seating members of the Negro race in such places of public accommodation and convenience upon a racially discriminatory basis and upon terms and conditions not imposed upon members of the so-called white or Caucasian race. Members of the so-called white or Caucasian race are similarly treated and discriminated against when accompanied by members of the Negro race."

It is alleged that petitioner, William Paul Berrien, Jr., was arrested "when he sought lodging, food, service, entertainment and comfort at the H & G Corporation d/b/a Henry Grady Hotel" which is alleged to be a hotel facility open to the general public, built on real estate owned by the State of Georgia, but leased to said corporation. It is alleged that the other petitioners were arrested at specified privately owned restaurants and cafeterias in the City of Atlanta, all of the arrests being on specified dates in 1963 and it being alleged that all of petitioners were indicted by the July-August, 1963, Grand Jury of Fulton County, Georgia, for violation of said statute; that the cases are presently pending in the Superior Court of Fulton County, Georgia, and are set to be heard during the week of February 17 to February 22, 1964, "the first case to be called for trial at 9:30 A.M. on February 17, 1964."

Petitioners allege that this Court has jurisdiction to hear and try the charges presently pending against them by virtue of 28 United States Code Annotated § 1443

(1) (2); That removal is sought to protect rights guaranteed to petitioners under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States and to protect the right of free speech, association, and assembly guaranteed by the First Amendment to the Constitution of the United States; that "petitioners are prosecuted for acts done under color of authority from the constitution and laws of the United States and for refraining to do an act which was, and is, inconsistent with the Constitution and Laws of the United States;" that they are denied and/or cannot enforce in the courts of the State of Georgia the specified rights claimed under the Constitution and laws of the United States, "in that, among other things, the State of Georgia by statute, custom, usage, and practice maintains a policy of racial discrimination." Petitioners pray for removal of said criminal proceedings from the state court to this court for trial and "that said prosecutions stand so removed as provided for in Title 28, United States Code Annotated, Sec. 1446 (c) and (d)."

The criminal statute under which these movant defendants are indicted is § 26-3005 of the Georgia Code, which reads, as follows:

> "Refusal to leave premises of another when ordered to do so by owner or person in charge. — It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor."

The defendants do not here contend that this statute is unconstitutional. The Supreme Court of Georgia has recently held that this statute does not violate the due process clause of the federal constitution. [1]

It is the duty of the district court to examine on its own motion the question of whether a case removed to it should be remanded to the state court without waiting for a motion to remand. [2]

The removal statute — § 1443, Title 28, U. S. C. — is to be strictly construed. [3]

A criminal prosecution or a civil cause under this statute [28 U. S. C., § 1443] because of a civil right or the enforcement of such right must arise out of the destruction of such right by the Constitution or statutory laws of the State wherein the action is pending. The statute does not justify federal interference where a party is deprived of any civil right by reason of discrimination or illegal acts of individuals or judicial or administrative officers. If the alleged wrongs are permitted by officers or individuals the remedy is the prosecution of the case to the highest court of the State and then to the Supreme Court of the United States as the laws of the United States authorize. The statute contemplates that during the trial of a particular case, the state court will respect and enforce the right of the defendant

1. Clark v. State of Georgia (28971), Supreme Court of Georgia — Case No. 22,323, decided Jan. 30, 1964.
2. In Re MacNeil Bros. Co. (CCA Mass. 1958) 259 F. 2d 386; Westark Production Credit Ass'n v. Fidelity & Deposit Co., (D.C. W.D. Ark. 1951) 100 F. Supp. 52, 56; Rand v. State of Arkansas (D.C. W.D. Ark. 1961) 191 F. Supp. 20; Title 28, § 1447 (c), U. S. C.
3. Shamrock Oil Corp. v. Sheets, 313 U. S. 100; City of Birmingham, Ala. v. Croskey, 217 F. Supp. 947.

to the equal protection of the laws of the State or the constitutional laws of the United States. [4]

The duty to enforce and protect every right granted and secured by the United States Constitution rests equally upon State and Federal Courts. [5]

Considered in the light of the aforementioned authority, the petition for removal to this Court does not allege facts sufficient to justify the removal that has been effected.

Since the case was improperly removed to this Court, it is the duty of this Court to remand the same to the Superior Court of Fulton County, Georgia, [§ 1447 (c) Title 28, U. S. C.] and the defendants named in the above styled case are hereby required to report without delay to the Superior Court of Fulton County, Georgia, and there attend from day to day thereafter as may be ordered by said Superior Court.

It is therefore ORDERED, ADJUDGED and DECREED that the above styled case is hereby remanded

4. Hull v. Jackson County Circuit Court, (CCA Mich. 1943) 138 F. 2d 820; Rand v. State of Arkansas, supra, note 1; City of Birmingham, Ala. v. Croskey, supra, note 2; People of State of California v. Lamson, 12 F. Supp. 813; 2 Cyc. of Fed. Procedure, Sec. 3.82.
5. Gibson v. State of Mississippi, 162 U. S. 565, 40 L. Ed. 1075; Ex Parte Royall, 117 U. S. 241, 248, 29 L. Ed. 868 at p. 870; Synpp v. State of Ohio, 70 F. 2d 535.

to the Superior Court of Fulton County, Atlanta, Georgia.

This the 18th day of February, 1964.

BOYD SLOAN
United States District Judge

(Filed in Clerk's Office and a True Copy Certified, This February 19, 1964, B. G. Nash, Clerk. By Dalton K. Kirkpatrick, Deputy Clerk.)

APPENDIX B

Appeal from the United States District Court
for the Northern District of Georgia

Filed: March 12, 1964

In The United States Court Of Appeals
For The Fifth Circuit

Thomas Rachel, et al,

Appellants,

versus No. 21,354

The States of Georgria

Appellee.

Before TUTTLE, Chief Judge, WISDOM, Circuit Judge, and CARSWELL, District Judge.

PER CURIAM:

This Court having heretofore, in the case of Congress of Racial Equality v. City of Clinton, Louisiana, granted a stay of the order of remand returning the said case to the state courts of Louisiana, pending an appeal from such order of remand on the merits, we conclude that consistent with that order a stay should be granted to the appellants here.

The question of the appealability of an order of remand is presented in the C.O.R.E. case which will be promptly heard by this Court. We conclude that the effectiveness of the order of the District Court, dated February 18, 1964, remanding these cases to the Su-

perior Court of Fulton County should be delayed pending a determination of the appeal on the merits.

It is, therefore, ORDERED that the said order of February 18, 1964, be and the same is hereby stayed pending final disposition of this appeal on the merits or the earlier order of this Court.

This 12th day of March, 1964.

(Signed) ELBERT P. TUTTLE
ELBERT P. TUTTLE
United States Circuit Judge

(Signed) JOHN MINOR WISDOM
JOHN MINOR WISDOM
United States Circuit Judge

CARSWELL, District Judge, DISSENTING:

Orders of remand are not appealable under the affirmative language of the statute, nor have the courts before this held them so to be. The nature of the sufficient cause to disturb this universally applied rule.

I would, therefore, grant appellee's motion to dismiss this appeal.

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21354

THOMAS RACHEL, ET AL,
Appellants,

versus

STATE OF GEORGIA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(March 5, 1965.)

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and WHITEHURST, District Judge.

TUTTLE, Chief Judge: This is an appeal by the named appellant and 19 other persons charged with the violation of Georgia's so-called anti-trespass statute, Title 26 Georgia Code Annotated, Section 3005, from an order entered by the district court without a hearing remanding the cases for trial to the state court after they had been removed

by a petition for removal filed pursuant to Title 28 U.S.C.A. §1443(1) and (2) (the Civil Rights Removal Sections). Having held, in the case of *Congress of Racial Equality, et al. v. Town of Clinton, Parish of East Feliciana*, 5 Cir., 1964, ... F. 2d ...., that the enactment of the Civil Rights Act of 1964 resolved the question of appealability of remand orders as to cases removed to the Federal District Courts under Section 1443, *supra*,[1] we turn directly to the merits of the appeal.[2]

---

[1] Prior to the enactment of Section 901 of the Civil Rights Act of 1964, Title 28 U.S.C.A. §1447(b) on its face seemed to prohibit an appeal from an order of remand. It provided: "an order remanding a case to the state court from which it was removed is not reviewable on appeal or otherwise." Notwithstanding the provisions of that statute, however, a substantial question had been raised in the *CORE* case, supra, and in this case when this Court originally granted a stay of the remand order pending appeal whether the express provisions of 1447(b) applied to Civil Rights cases. We discussed this issue in the *CORE* case. This discussion need not be repeated by reason of the fact we have now determined that whether or not remand orders in such cases were appealable before the passage of the Civil Rights Act, the adoption of that Act by Congress forecloses the issue in favor of appealability.

The appellee's contention that this appeal is untimely has no merit. The notice of appeal was filed sixteen calendar days after the order appealed from, and it could only be considered untimely if the ten-day time limit of Fed. R. Crim. P. 37(a)(2) were applicable. It is absolutely clear, however, that Rule 37 has no application here.

The Supreme Court promulgated Rules 32 through 39, without submitting them to Congress, under the authority of the Criminal Appeals Rules Act. Act of Feb. 24, 1933, c. 119, 49 Stat. 904, as amended, 18 U.S.C. § 3772. The only power given under that Act was to prescribe rules of procedure "with respect to any or all proceedings *after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty* . . . ." (Emphasis added.) When it adopted the predecessor to Rule 37(a)(2), see 292 U.S. 661, 662, and when it promulgated that Rule in its present form, see 327 U.S. 825, the Supreme Court made it explicit that the Rule was meant to apply only to criminal appeals "after verdict, or finding of guilt . . . or plea of guilty."

The question whether the predecessor to Rule 37(a)(2) applied to a criminal appeal prior to verdict—in that case an appeal from an adjudication of criminal contempt—was

The question to be resolved on the merits of the appeal is whether the petition for removal in this case adequately stated a basis for removal under the indicated section of the removal statutes. Title 28 U.S.C.A. §1443, provides as follows:

"§1443. Civil rights cases

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place where it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or

squarely decided in *Nye v. United States*, 1941, 313 U.S. 28, 43-44. Rejecting the argument that the Criminal Rules applied to all cases that could be categorized as "criminal", the Court held that the history and the language of the order promulgating the Rule required that it be applied only "with respect to any or all proceedings *after verdict* in criminal cases." (Emphasis added.)

In 1940, Congress authorized the Supreme Court to prescribe rules of procedure in criminal proceedings "prior to and including verdict." Act of June 29, 1940, c. 445, 54 Stat. 688, as amended, 18 U.S.C. § 3771. Rules 1-31 and 40-60 were promulgated under the authority of this Act. It is clear that Rule 37(a)(2) can find no authority in this statute. Not only was it expressly prescribed under the "after verdict" enabling act, see 327 U.S. 825, but, as authorized in that act, it was never submitted to Congress. Under the "prior to verdict" enabling act, no rule could become effective unless submitted to Congress for its acquiescence. Only Rules 1-31 and 40-60 were so submitted. See 327 U.S. 824; Dession, The New Federal Rules of Criminal Procedure: II, 56 Yale L.J. 197, 230 (1947).

for refusing to do any act on the ground that it would be inconsistent with such law."

The meaning of this statute, passed in a package with the first post-bellum Civil Rights Act, Act of April 9, 1866, 14 Stat. 27, has been the subject of debate since its passage. It was originally construed to cover cases in which the defendant alleged his inability to obtain a fair trial due to such informal impediments as local prejudice. *State v. Dunlap*, 1871, 65 N.C. 491; see also *Ex parte Wells*, 3 Woods 128, quoted in *Kentucky v. Powers*, 1906, 201 U.S. 1, 27 (Bradley, J., on circuit).

Later, the view was taken that only formal impediments, stemming from State legislation, could give rise to such deprivations of equal civil rights as would allow a defendant to invoke federal jurisdiction by removal. *Kentucky v. Powers*, 1906, 201 U.S. 1. As this latter view was the latest Supreme Court pronouncement directly on the matter, the district court in the present case felt bound by it. In remanding the case to the State court, the district court states that "A criminal prosecution or a civil case under this statute [28 U.S.C.A. §1443] because of a civil right or the enforcement of such right must arise out of the destruction of such right by the Constitution or statutory laws of the State wherein the action is pending."

In delineating the scope of the civil rights removal statute for the first time, the Supreme Court placed great stress on the necessity that the denial of protected rights be made to appear in advance of trial, *Virginia v. Rives*,

1879, 100 U.S. 313. By way of illustration, the Court indicated that denials of equal rights at the hands of court officials, occurring during trial, could not be cured by removal but that such denials under state legislation could be safeguarded against in this manner. It has been argued that, under a realistic appraisal of the facts in a given case, the Supreme Court today would recognize the right to removal under §1443(1) even where no legislative denial of rights is shown. See Krieger, "Local Prejudice and Removal of Criminal Cases From State to Federal Courts," 19 St. John's L. Rev. 43 (1944); Note, "Local Prejudice in Criminal Cases," 54 Harv. L. Rev. 679, 685-86 (1941). Such a recognition by the Court thus would reemphasize the putative essence of *Virginia v. Rives*—that the denial of equal rights must be susceptible of demonstration before trial—and minimize the illustrative language in that case dealing with state legislation.

We have been asked by the appellants to anticipate such an interpretation of §1443 by the Supreme Court; however, there is no reason for us to reach that question in this case. This is so for two reasons. First, the petition in this case did allege the denial of protected rights by State legislation. Secondly, the passage of the Civil Rights Act of 1964 and its interpretation in *Hamm v. City of Rock Hill*, 1964, ... U.S. ...., provide a different, and narrower, ground on which this case may be disposed of.

After alleging the specific facts respecting the arrests of each of the 20 persons, including allegations that each of them was, when arrested, seeking food or accommoda-

tions at a restaurant or hotel, the petitioners alleged that each of their acts had been followed by special Grand Jury presentments charging them with violating the named section of the Georgia Code, and that the said presentments were pending in the Superior Court of Fulton County and were to be heard within a few days if not transferred. They then alleged the following:

"(3) By virtue of Title 28, United States Code Annotated, Section 1443(1) and (2), this Court has jurisdiction to hear and try the charges now pending against the petitioners. Removal is sought to protect the rights guaranteed to petitioners under the due process and equal protection clauses of Section 1, Fourteenth Amendment of the Constitution of the United States and to protect the right of free speech, association, and assembly guaranteed by the First Amendment of the Constitution of the United States.

"Moreover, petitioners are being prosecuted for acts done under color of authority derived from the constitution and laws of the United States and for refusing to do an act which was, and is, inconsistent with the Constitution and Laws of the United States.

"(4) The petitioners are denied and/or cannot enforce in the Courts of the State of Georgia rights under the Constitution and Laws of the United States providing for the equal rights of citizens of the United States and all persons within the jurisdiction thereof, in that, among other things, the State of Georgia by *statute*, custom,

> usage, and practice supports and maintains a policy of racial discrimination." (Emphasis added).

The district court apparently decided that, since the removal petition did not expressly allege that Section 26-3005 was unconstitutional on its face, the petition failed to allege adequately that "the destruction of" the right to equal protection granted by the United States Constitution was caused by "statutory laws of the State" of Georgia. The allegation contained in paragraph 4 of the petition for removal, quoted above, that petitioners were denied their rights under the constitution and laws of the United States because the State of Georgia "by statute . . . supports and maintains a policy of racial discrimination," however, clearly asserts the precise ground for removal that the trial court said was required. This would not be so, of course, if a petition for removal, unlike other pleadings under the Federal Rules of Civil Procedure, must contain something more than the bare bones allegation of the existence of a right. As to this matter, we have no doubt that the rules of notice pleading apply with as much vigor to petitions for removal as they do to other pleadings, which, according to Rule 8(f) of the Federal Rules of Civil Procedure, "shall be so construed as to do substantial justice." The statute requires that the petition for removal contain "a short and plain statement of the facts which entitle him or them to removal." 28 U.S.C.A. §1446. The Supreme Court has held that the removal must be effected by the filing of "a verified petition setting forth, agreeably to the ordinary rules of pleading, the particular

facts, not already appearing, out of which the right arises." *Chesapeake & Ohio Railway Co. v. Cockrell*, 1914, 232 U.S. 146, 151. It is plain, therefore, that the petition is to be construed "agreeably to the ordinary Rules of pleading" since in fact the petition for removal is the basis for the federal court's jurisdiction and it is a pleading of the facts necessary to vest jurisdiction in the federal court.

In *Allman v. Hanley*, 5 Cir., 1962, 302 F. 2d 559, 562, this Court said:

> "The absence of detailed grounds setting forth basis for removal is not fatal to defendants' right to remove. We think that the allegation that petitioners were officers acting under color of office in the employment of the United States was sufficient. Title 28, United States Code, Section 1446(a) requires only a short, plain statement of facts entitling a defendant to removal."

This is in line with this Court's construction of the Federal Rules of Civil Procedure relating to the liberality of pleadings under the rules. If a petition for removal states sufficient in the way of allegations to support proof of adequate grounds for removal, it is to be treated in the same manner as a complaint in federal court. As to such a pleading, this Court has frequently reiterated what we said in *Des Isles v. Evans*, 5 Cir., 1952, 200 F. 2d 614, 615, in quoting Moore's Federal Practice:

> "The courts have ruled time and again that a motion to dismiss for failure to state a claim

> should not be granted unless it appears to a certainty that the plaintiff would be entitled to no relief under any state of facts which could be proved in support of his claim."

In that case we also quoted from an opinion by this Court in *De Loach v. Crowley's Inc.*, 5 Cir., 1942, 128 F. 2d 378, 380:

> "Under the Rules of Civil Procedure a case consists not in the pleadings, but the evidence, for which the pleadings furnish the basis. Cases are generally to be tried on the proofs rather than the pleadings."

We conclude, therefore, that this petition for removal adequately alleged that the appellants suffered a denial of equal civil rights by virtue of the statute under which they were being prosecuted in the State court. Unless there is patently no substance in this allegation, a good claim for removal under §1443(1) has been stated. That the allegation does not lack substance may be seen from a consideration of the Civil Rights Act of 1964, as construed by the Supreme Court.

Statutes of South Carolina and Arkansas, substantially the same as the Georgia statute involved here, were before the Supreme Court in *Hamm v. City of Rock Hill*, *supra*. Having upheld the constitutionality of Title II (Public Accommodations) of the Civil Rights Act of 1964 both as respects businesses serving interstate travelers and businesses of a more local nature a substantial part of whose products have moved in commerce, *Heart of*

Atlanta Motel, Inc. v. United States, 1964, ... U. S. ....; *Katzenbach v. McClung*, 1964, ... U.S. ...., the Court in *Hamm* held that prosecutions under State anti-trespass statutes may not stand if the denial of service or the request for removal from the premises was based upon an intent to discriminate against the arrested persons on account of race. The Court ruled that "The Civil Rights Act of 1964 forbids discrimination in places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. Although the conduct in the present cases occurred prior to enactment of the Act, the still pending convictions are abated by its passage." The Court further said:

> "In short, now that the Congress has exercised its constitutional power in enacting the Civil Rights Act of 1964 and has declared that the public policy of our country is to prohibit discrimination in public accommodations as therein defined, there is no public interest to be served in the further prosecution of the petitioners. And in accordance with the long established rule of our cases they must be abated and the judgment in each is therefore vacated and the charges are ordered dismissed."

In the removal petitions in the cases pending before this Court, it is explicitly alleged that the arrests of appellants "were effected for the sole purpose of aiding, abetting, and perpetuating customs, and usages which have deep historical and psychological roots in the mores and

attitudes which exist within the City of Atlanta with respect to serving and seating members of the Negro race in such places of public accommodation and convenience upon a racially discriminatory basis and upon terms and conditions not imposed upon members of the so-called white or Caucasian race. Members of the so-called white or Caucasian race are similarly treated and discriminated against when accompanied by members of the Negro race." These are allegations of fact, which if true, place these prosecutions by the State of Georgia squarely within the principle announced by the Supreme Court in *Hamm v. City of Rock Hill.*

In its opinion, the Supreme Court pointed out that no State may now prosecute Negroes who were charged with having refused to leave premises in accordance with the provisions of the Georgia statute where the request to leave was based upon a policy of racial discrimination. The Court pointed out that Section 203 of the Act provides:

> "No person shall (a) withhold, deny or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by Section 201 or 202, or (b) intimidate, threaten or coerce any person with the purpose of interfering with any right or privilege secured by Section 201 or 202, or (c) *punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured* by Section 201 or 202." (Emphasis in Supreme Court opinion).

The Court said, "On its face, this language prohibits prosecution of any person for seeking service in a covered establishment because of his race or color." The Court then proceeded to apply this prohibition to pending as well as prospective prosecutions. If therefore, the arrests and prosecutions of the appellants "were effected for the sole purpose of aiding, abetting and perpetuating customs . . . with respect to serving and seating members of the Negro race" in the respective restaurants "upon a racially discriminatory basis," as alleged, then under the holding of the Supreme Court these prosecutions will have to be abated.

Because of the Civil Rights Act of 1964, Title II, and its recent interpretation by the Supreme Court, we hold that the allegations of these petitions are sufficient to invoke federal jurisdiction under 28 U.S.C.A. §1443(1). That statute provides, as it has provided since its enactment in 1866, a federal forum in civil actions and criminal prosecutions to vindicate, in certain circumstances, rights "under any law providing for the equal civil rights of citizens of the United States." When the removal statute was originally enacted, the "law providing for . . . equal civil rights" most clearly contemplated was found in sections 1977 and 1978 of the Revised Statutes, *Strauder v. West Virginia*, 1879, 100 U.S. 303, 311. These sections formed part of the 1866 Civil Rights Act along with the removal provisions. In upholding the constitutionality of the removal statute, the Supreme Court made it clear that that act was merely one legitimate way for Congress to ensure the effectiveness of the substantive provisions of the civil rights laws. *Strauder v. West Virginia, supra,*

at 310-12. The Court said, "A right or an immunity, whether enacted by the Constitution or only guaranteed by it, even without any express delegation of power, may be protected by Congress. . . . And one very efficient and appropriate mode of extending such protection and securing to a party the enjoyment of the right or immunity, is a law providing for the removal of his case from a State court, in which the right is denied by the State law, into a Federal court, where it will be upheld. This is an ordinary mode of protecting rights and immunities conferred by the Federal Constitution and laws. Sec. 641 [now §1443(1)] is such a provision." See also *Virginia v. Rives*, 1879, 100 U. S. 313, 318.

From its inception, then, the civil rights removal statute has been, as its language plainly contemplates, an adjunct to the substantive civil rights statutes enacted by Congress. The history of the several codifications and recodifications of sections 1977 and 1978, of the several amendments and enlargements upon these seminal civil rights laws, and of the parallel codifications and recodifications of the removal statute which is presently 28 U.S.C.A. §1443(1) amply supports this view of the tenor of the statutory language. (The history of these provisions is easily traceable through annotations in U.S.C.A.). It can not be doubted that §1443(1) is today an adjunct of the Civil Rights Act of 1964. See *New York v. Galamison*, 2nd Cir., 1965, ... F. 2d ..., 33 U. S. Law Week 2389". Particularly is this so in light of the references to the provision of a federal forum on removal for the protection of substantive civil rights in the act itself, Title IX, §901, and in its legislative history. See House Judici-

ary Committee Report reprinted in BNA, The Civil Rights Act of 1964, pp. 286-87; remarks of Senator Dodd, 110 Cong. Rec. 6739 (daily ed. April 6, 1964).

Congress, while carving out rights and immunities in the area of civil rights, has provided a jurisdictional basis for efficiently and appropriately protecting those rights and immunities in a federal forum. The provision of this protective forum is not limited by the States' obligation, under the Supremacy Clause, to protect federally guaranteed civil rights as zealously as would a federal court. That there is such an obligation on State tribunals is true, and vital, but it is irrelevant here. Theoretically, there is no need for any federal jurisdiction at all—except that of the Supreme Court—because State courts are required to protect federally created rights. Nevertheless, the power of Congress to provide a federal forum also to protect such rights is undoubted. Such power was exercised in enacting §1443(1).

The federally guaranteed right and immunity here pertinent were elucidated by the Supreme Court in *Hamm v. City of Rock Hill, supra,* as follows:

> "[T]he language of §203(c) supports a conclusion that non-forcible attempts to gain admittance or remain in establishments covered by the Act, are immunized from prosecution, for the statute speaks of exercising or attempting to exercise a 'right or privilege' secured by its earlier provisions. The availability of the Act as a defense against punishment is not limited solely to those

> who pursue the statutory remedies. The legislative history specifically notes that the Act would be a defense to criminal trespass, breach of the peace and similar prosecutions."

Under the allegations of the petitions in the present case, these appellants have been denied, because of State legislation, "a right under . . . [a] law providing for the equal civil rights of citizens of the United States." They are entitled to a federal forum as provided for in 28 U.S.C.A. Sec. 1443(1) in which to prove the allegations. If the allegations are proved, then the federal court acquires jurisdiction for all purposes. Under normal circumstances the state prosecutions would then proceed in the federal court. Here, however, the finding of the jurisdictional fact immediately brings the *Hamm* case into play. The same fact determination requires dismissal rather than further prosecution in the District Court.[3]

Upon remand, therefore, the trial court should give appellants an opportunity to prove the allegations in the removal petition as to the purpose for the arrests and prosecutions, and in the event it is established that the removal of the appellants from the various places of public accommodation was done for racial reasons, then under authority of the *Hamm* case it would become the duty of the district court to order a dismissal of the prosecutions without further proceedings.

Concluding, as we do, that the petition for removal alleges sufficient grounds showing a denial of the civil

[3] In light of the view we have taken of this case, it is unnecessary to review the appellants' contention that they are also entitled to removal under 28 U.S.C.A. §1443(2).

rights of the appellants in the state courts by reason of the State statute, it follows that the order of remand was in error and it must be reversed and the case remanded to the district court for further proceedings not inconsistent with this opinion.

REVERSED AND REMANDED.

BELL, Circuit Judge, concurring in part and dissenting in part:

I regret that I cannot concur altogether in the opinion of the majority. The reasoning preliminary to the holding therein seems to embrace the following steps. We begin with the jurisdictional base, i.e., the removal statute. 28 USCA, § 1443(1). Next, the case of *Kentucky v. Powers*, 1906, 201 U.S. 1, is cited for authority that the removal statute is limited to those situations where a state law gives rise to the deprivation of equal civil rights by reason of which a defendant seeks to invoke federal jurisdiction. Then the removal petition itself is construed, and the conclusion reached that appellants do indeed assert that they were being denied their equal civil rights in the state court because of a Georgia statute. The fact that the statute is nowhere specified is met by applying the philosophy of federal notice type pleading to the bare allegation of the removal petition, to the end of assuming that the petition referred to Georgia Code 26-3005, the anti-trespass statute.[1] It is also assumed that

[1] It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating

appellants will claim on hearing that the statute is either unconstitutional on its face or as applied by the state court to appellants. The unconstitutionality in application may be claimed on the holding of the Supreme Court in *Hamm v. City of Rock Hill*, 1964, ...U.S....., ... S.Ct. ...., 13 L.Ed.2d 300, in its retroactive application of the Civil Rights Act of 1964 for reason of national policy to the socalled sit-in cases. That case protects persons engaged in peaceable sit-ins in restaurants covered by the Act from prosecution.

Thus, the majority concludes that the removal petition may fairly be read as alleging a valid claim for removal under 28 USCA, § 1443(1). And up to this point, I am in agreement with the majority. That is, I agree that the removal petition may now be read to allege that appellants are unable to enforce in the Georgia courts the right, conferred by the Civil Rights Act of 1964 as construed by *Hamm v. City of Rock Hill*, to be free from prosecution under state trespass statutes for peaceful sit-in demonstrations. The fact is that appellants were being prosecuted under such a statute, viz., Ga. Code § 26-3005. Therefore I also agree that the District Court erred in remanding to the state court without a hearing. However, I wish to disassociate myself from that part of the holding as to how these cases are to be treated on remand to the District Court.

We should reverse and remand for a hearing on the question of jurisdiction. But, the majority states, and

---

the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor. (Ga. Laws 1960, p. 142)

this is where I disagree, that upon remand the trial court should give appellants the opportunity to prove their allegations as to the purpose of the arrests and prosecutions, and in the event the refusal of service in places of public accommodation was for racial reasons, then under the authority of the *Hamm* case it would become the duty of the District Court to dismiss the prosecutions. If this is all that remains for consideration on remand, the holding of the majority is tantamount to applying *Hamm v. Rock Hill* in all its sweep against trespass statutes, retroactively to the State of Georgia. It is, in effect, a holding that Georgia has applied and will continue to apply its trespass statute contrary to the teachings of the Supreme Court in *Hamm*, even though *Hamm* had not been decided when the cases were in the state courts and even though the state courts have not had an opportunity to deal with these cases in the light of *Hamm*. In dispensing with the requirement that appellants prove on remand that the Georgia courts will not accord them their rights under the *Hamm* decision, the theory of the majority must be that *Hamm* has tainted these prosecutions *ab initio*, and hence jurisdiction in the federal court has been established retroactively by the very fact that the prosecutions were ever commenced. This casual treatment of the Georgia courts is a striking departure from my concept of Federalism and from the duty which I think comity imposes upon us with regard to that system.

The fact is that the Supreme Court had never, before and absent *Hamm* and the 1964 Civil Rights Act, held the use of state trespass statutes under the circumstances

here presented to be unconstitutional. This was one of the problems that the Civil Rights Act sought to obviate. See the following cases where the question was pretermitted: *Griffin v. Maryland*, 1964, ... U.S. ....., 84 S.Ct. 1770, 12 L.Ed.2d 754; *Barr v. Columbia*, 1964, ... U.S. ....., 84 S.Ct. 1734, 12 L.Ed.2d 766; *Robinson v. Florida*, 1964, ... U.S. ....., 84 S.Ct. 1693, 12 L.Ed.2d 771; *Bell v. Maryland*, 1964, ... U.S. ....., 84 S.Ct. 1814, 12 L.Ed.2d 822; and *Bouie v. Columbia*, 1964, ... U.S. ....., 84 S.Ct. 1697, 12 L.Ed.2d 894. We recognized this fact in *Poole v. Barnett*, 5 Cir., 1964, 336 F.2d 267. It is now undoubtedly true that the 1964 Civil Rights Act and the *Hamm* decision have placed a gloss on state trespass statutes so that they may not be applied against those peaceably seeking service in restaurants covered by the Act, or against those whose prosecutions for such activity were pending at the time of the passage of the Act. However, in view of this gloss being of a supervening nature, I would give the Georgia court from whence these cases were removed a chance to apply the *Hamm* doctrine unless appellants can demonstrate on remand to the District Court that the Georgia court would not fairly accord them their rights under *Hamm*.

Thus, on remand the District Court should first determine just what appellants do claim under the present allegations of their notice type pleading. If they contend that the statute is unconstitutional in its application to them by the state, by virtue of the *Hamm* case or otherwise, then the question will arise whether the state in fact seeks to apply the statute in an unconstitutional manner. If it appears, and the burden would be on appellants to

show this, that the state will apply the statute contrary to the teachings of *Hamm*, the District Court should deny remand and retain the cases for disposition; otherwise, the cases should be remanded.

I doubt that appellants can point to any right that would be jeopardized by remand to the state court. The Supreme Court of Georgia has already applied *Hamm* to a group of sit-in convictions with the result of abating the conviction and ordering the cases dismissed. *Bolton, et al. v. State of Georgia*, No. 22,810, decided February 8, 1965. Such jeopardy as may be involved is jeopardy to our dual system of courts, federal and state. And a federal court should not lightly intrude into a sphere of activity left to state and local government under the Constitution: the maintenance of local order. Because the decision of the majority goes to the point of vesting jurisdiction in the federal court retroactively, a step further than the Supreme Court went in *Hamm*, I respectfully dissent.

WHITEHURST, District Judge, concurring in part and dissenting in part:

I concur in Judge Tuttle's opinion on the merits. However, the Notice of Appeal having been filed six days later than permitted under Rule 37(a)(2) of the Rules of Criminal Procedure, I would dismiss the appeal.

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APPENDIX D

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 21354

THOMAS RACHEL, ET AL,
Appellants,

versus

STATE OF GEORGIA,
Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

(April 19, 1965.)

ON PETITION FOR REHEARING.

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and WHITEHURST, District Judge.

PER CURIAM: It is ORDERED that the petition for rehearing filed in the above styled and numbered cause be, and the same is, hereby DENIED.

BELL, Circuit Judge, concurring in part and dissenting in part:

I would grant the petition for rehearing to the extent noted in my dissent to the original opinion and for that purpose I dissent from the denial of the petition for rehearing; otherwise I concur.

WHITEHURST, District Judge, dissenting:

I would grant the petition for rehearing for the reason that the Appellate Court has no jurisdiction by virtue of Rule 37(a)(2) of the F.R.C.P.

PER CURIAM: It appearing that each of the members of the Court adheres to his views originally expressed in the several opinions heretofore filed, the petition for rehearing is DENIED.

Adm. Office, U. S. Courts—E. S. Upton Printing Co., N. O., La.

APPENDIX E

PERTINENT PARTS OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT I, CONSTITUTION OF THE UNITED STATES

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT XIV, CONSTITUTION OF THE UNITED STATES

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

SECTION 1443, TITLE 28, U. S. C.

"Section 1443. Civil rights cases

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. June 25, 1948, c. 646, 62 Stat. 938.)"

SECTION 1446 (a), (c), (d), TITLE 28, U. S. C.

"Section 1446. Procedure for removal

"(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

" . . . . . .

"(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

"(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed."

SECTION 1447 (c), (d), TITLE 28, U. S. C.

"Section 1447. Procedure after removal generally

" . . . . . .

"(c) If at any time before final judgment it appears

that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

"(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. June 25, 1948, c. 646, 62 Stat. 939, amended May 24, 1949, c. 139, Section 84, 63 Stat. 102.)"

SECTION 71, FORMER TITLE 28, U. S. C. (JUDICIAL CODE, SEC. 28)

". . . . Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal from the decision of the district court so remanding such cause shall be allowed. . . . . ."

SECTION 74, FORMER TITLE 28, U. S. C. (JUDICIAL CODE, SEC. 31)

"When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person,

for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. . . . . ."

SECTION 76, FORMER TITLE 28, U. S. C. (JUDICIAL CODE, SEC. 33)

"When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority claimed by such officer or other person under any such law, ... the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court. . . . . ; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution. . . . ."

ACT OF 1887, SECS. 2 AND 5
(24 STAT. 553, 555)

"Section 2. . . . . Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

"Section 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections 641, or in 642, or in 643, or in 722, or in title 24 of the Revised Statutes of the United States, or mentioned in section 8 of the act of Congress of which this act is an amendment, or in the act of Congress approved March 1, 1875, entitled 'An act to protect all citizens in their civil or legal rights.'"

ACT OF 1875, SEC. 5 (18 STAT. 472)

"Section 5. That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, ... , the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require,

and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the State Court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

ACT OF 1866, SEC. 3 (14 STAT. 27, 28)

"An Act to protect all persons in the United States in their Civil Rights, and furnish the means of their vindication.

"Section 3. And be it further enacted, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the right secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating

judicial proceedings in certain cases,' approved March three, eighteen hundred and sixty three, and all acts amendatory thereof. . . . . ."

REVISED STATUTES, TITLE XIII, THE JUDICIARY, SEC. 641

"When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid; or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution, may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceeding in the State courts shall cease, and shall not be resumed except as hereinafter provided. . . . . But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the circuit court as herein provided, a certificate, under the seal of the circuit court, stating such failure, shall be given, and upon the production thereof

in said State court, the cause shall proceed therein as if no petition for a removal had been filed." (Note: No mention made here of remand orders, except upon failure to file copies of proceedings in circuit court, or of the right to appeal a remand order.)

RULE 37 (a) (2), TITLE 18, U. S. C.

"Rule 37. Taking Appeal; and Petition for Writ of Certiorari

"(a) . . . . . .

"(1) . . . . . .

"(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from."

RULE 45 (a), TITLE 18, U. S. C.

"Rule 45. Time

"(a) Computation. In computing any period of time the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday."

RULE 73 (a), TITLE 28, U. S. C.

"Rule 73. Appeal to a Court of Appeals

"(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within such an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, ..."

GEORGIA CODE ANNOTATED, 26-3005

"26-3005. Refusal to leave premises of another when ordered to do so by owner or person in charge. — It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor. (Acts 1960, p. 142.)"

RULE 54 (a) (1), (b) (1), TITLE 18, U. S. C.

"RULE 54. Application and Exception.

"(a) Courts and Commissioners.

"(1) Courts. These rules apply to all criminal proceedings in the United States District Courts, which include the District Court for the Territory of Alaska, the District Court of Guam and the District Court of the Virgin Islands; in the United States Courts of Appeals; and in the Supreme Court of the United States . . . ."

"(b) Proceedings.

"(1) Removed Proceedings. These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law."

ACT OF JUNE 25, 1948, c. 645, 62 Stat. 683, p. 845

"Section 3732. Taking of Appeal—Notice—Time (Rule) See Fed. Rules of Crim. Procedure, Rule 37 (a)."

CIVIL RIGHTS ACT OF 1964

§201:

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce . . .

* * * * * * * * *

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment . . .

"(c) The operations of an establishment affect commerce within the meaning of this title if . . . it serves or offers to serve interstate travelers . . ."

§203:

"No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202."

APPENDIX F

United States Court of Appeals
FOR THE FIFTH CIRCUIT

October Term, 1964

No. 21354

D. C. Docket No. 23,869

THOMAS RACHEL, *et al.*,

Appellants,

versus

STATE OF GEORGIA,

Appellee.

Appeal from the United States District Court for the Northern District of Georgia.

Before TUTTLE, Chief Judge, BELL, Circuit Judge, and WHITEHURST, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, State of Georgia, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

"BELL, Circuit Judge, concurring in part and dissenting in part"

"WHITEHURST, District Judge, concurring in part and dissenting in part"

March 5, 1965

Issued as Mandate:

APPENDIX G

United States Court of Appeals
FOR THE FIFTH CIRCUIT

No. 21354

THOMAS RACHEL, *et al.*,

Appellants,

versus

THE STATE OF GEORGIA,

Appellee.

ON CONSIDERATION OF THE APPLICATION of the appellee in the above numbered and entitled cause for a stay of the mandate of this court therein, to enable appellee to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, IT IS ORDERED that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition and record have been filed. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

DONE AT NEW ORLEANS, LA., this 27th day of April, 1965.

/s/ ELBERT P. TUTTLE
Chief Judge.

(ORIGINAL FILED APRIL 27, 1965)

CERTIFICATE OF SERVICE

GEORGIA, FULTON COUNTY

I, J. Robert Sparks, of counsel for the State of Georgia, Petitioner, certify that I have this day served copies of the foregoing Petition for Writ of Certiorari, and Appendices, upon Respondents, by depositing in the United States Post Office in Atlanta, Georgia two copies of same in an envelope addressed to Donald L. Hollowell and Howard Moore, Jr., Esquires, Attorneys at Law, 859½ Hunter Street, N. W., Atlanta, Georgia 30314, and two copies of same in an envelope addressed to Jack Greenberg, Esquire, Attorney at Law, 10 Columbus Circle, New York, New York 10019, counsel of record for Respondents, with sufficient first class postage affixed thereto, plus air mail postage for Mr. Greenberg's copies.

This 14th day of May, 1965.

J. ROBERT SPARKS
Assistant Solicitor General
Atlanta Judicial Circuit

FILE COPY

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JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 147

GEORGIA, PETITIONER

vs.

THOMAS RACHEL, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Judicial Building
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INDEX

Page

Opinions Below 1

Jurisdiction 2

Constitutional Provisions and Statutes Involved 3

Questions Presented 4

Statement of the Case 7

Summary of Argument 10

Argument 13

I. The Notice of Appeal of the Remand Order Was Not Timely Filed, and Petitioner's Timely Motion to Dismiss Appeal Should Have Been Granted 13

II. The Petition for Removal Does Not Set Out Any Valid Ground for Removal 30

III. Assuming Arguendo that Remand to the District Court for an Evidentiary Hearing Was Proper, the Directions Given the Lower Court Were Clearly Erroneous 50

Conclusion 54

Appendices
Constitutional Provisions and Statutes Involved 59

Certificate of Service 58

Appendix "A" 59

CITATIONS

Cases

Arkansas v. Howard, D.C.E.D. Ark., 1963, 218 F. Supp. 626 ..... 32, 49

Berman v. United States, 1964, 378 U.S. 530 29

INDEX (Continued)

Page

Birmingham v. Croskey, D.C.N.D. Ala., 1963, 217 F. Supp. 947 49

Bolton v. State, 220 Ga. 632 ..... 11, 52, 53, 56

City of Chester v. Anderson, 3 Cir., 1965, 347 F. 2d 823 ..... 44, 45

Chicago etc R. Co. v. Roberts, 1891, 141 U. S. 690 26

City of Clarksdale, Miss. v. Gertge, D.C.N.D. Miss., 1964, 237 F. Supp. 213 ..... 47, 49

DiBella v. United States, 1962, 369 U.S. 121 ..... 23, 25, 27

Gibson v. Mississippi, 1896, 162 U.S. 565 32

Griffin v. Maryland, 1964, 378 U.S. 130 51

Hamm v. City of Rock Hill, S. C., 1964, 379 U.S. 306 ..... 6, 7, 11, 12, 50, 51, 52, 53.

Hill v. Pennsylvania, D.C.W.D. Pa., 1960, 183 F. Supp. 126 32

Hull v. Jackson County Circuit Court, 6 Cir., 1943, 138 F. 2d 820 32

Kentucky v. Powers, 1906, 201 U.S. 1 ..... 32, 33, 34, 42

Maryland v. Soper, Judge, (No. 1), 1925, 270 U.S. 9 48

Moore v. United States, 10 Cir. 1955, 150 F. 2d 323 21

Murray v. Louisiana, 1896, 163 U.S. 101 32

Neal v. Delaware, 1880, 103 U.S. 370 ..... 32, 42

North Carolina v. Jackson, D.C.M.D.N.C., 1955, 135 F. Supp. 682 32

Nye v United States, 1941, 313 U.S. 28 ..... 13, 19, 20, 21

Parr v. United States, 1956, 351 U.S. 513 25

INDEX (Continued)

Page

Peacock et al. v. City of Greenwood, 5 Cir., 1965, 347 F. 2d 679 ..... 34, 44, 46

People of the State of New York v. Galamison, 2 Cir., 1965, 342 F. 2d 255; cert. den. 85 S. Ct. 1342 ..... 38, 44, 45, 49

Peterson v. City of Greenville, S. C., 1963, 373 U.S. 244 51

Shuttlesworth v. City of Birmingham, Ala., 1963, 373 U.S. 262 51

Smith v. Mississippi, 1896, 162 U.S. 592 32

Snypp v. Ohio, 6 Cir., 1934, 70 F. 2d 535, cert. den. 293 U.S. 563 32

Texas v. Doris, D.C.S.D. Texas, 1938, 165 F. Supp. 738 32

Thompson v. City of Louisville, 1962, 362 U.S. 199 51

United States v. Koenig, 5 Cir., 1961, 290 F. 2d 166 ..... 23, 25

United States v. Lederer, 7 Cir., 1943, 139 F. 2d 861 21

United States v. Robinson, 1960, 361 U.S. 220 29

United States v. United Mine Workers of America, 1947, 330 U.S. 258 28

United States v. Williams, 4 Cir., 1955, 227 F. 2d 149 18

Virginia v. Rives, 1879, 100 U.S. 313 ..... 31, 42

Williams v. Mississippi, 1898, 170 U.S. 213 32

Zacarias v. United States, 5 Cir., 1958, 261 F. 2d 416 ..... 22, 25, 27

INDEX (Continued)

Page

CONSTITUTION AND STATUTES

Constitution of the United States:

First Amendment 59

Fourteenth Amendment 59

Statutes and Rules:

Act of 1866, Sec. 3 (14 Stat. 27, 28) 59

Act of 1875, Sec. 5 (18 Stat. 470, 472) 61

Act of 1887, Secs. 2 & 5 (24 Stat. 553, 555) 60

Former Sec. 71, former Title 28, U.S.C., (Judicial Code Sec. 28) 61

Former Sec. 74, former Title 28, U. S. C., (Judicial Code, Sec. 31) 62

Former Sec. 76, former Title 28, U. S. C., (Judicial Code, Sec. 33) 62

Act of February 24, 1933, c. 119, 47 Stat. 904 63

Act of March 8, 1934, c. 49, 48 Stat. 399 64

Act of June 29, 1940, c. 445, 54 Stat. 688 65

Act of November 21, 1941, c. 492, 55 Stat. 776 66

Sec. 3731, Act of June 25, 1948, c. 645, 62 Stat. 683, pp. 844–845 66

Sec. 3732, Act of June 25, 1948, c. 645, 62 Stat. 683, p. 845 68

Sec. 1443 (1) (2), Title 28, U. S. C. 68

Sec. 1446 (a), (c), (d), Title 28, U. S. C. 69

Sec. 1447 (c), (d), Title 28, U. S. C. 69

INDEX (Continued)

Page

Sec. 2107, Title 28, U. S. C. 70

Sec. 201 (b) (2), Civil Rights Act of 1964, 78 Stat. 241 (pp. 289–291) 70

Sec. 203, Civil Rights Act of 1964, 78 Stat. 241 (pp. 289–291) 71

Sec. 1404, Title 18, U. S. C. 71

Sec. 1981, Title 42, U. S. C. 72

Revised Statutes, Title XIII, the Judiciary, Sec. 641 72

Rule 37 (a) (2), Title 18, U. S. C. 73

Rule 54 (b) (1), Title 18, U. S. C. 74

Rule 45 (a), Title 18, U. S. C. 74

Rule 59, Title 18, U. S. C. 74

Rule 73 (a), Title 28, U. S. C. 75

Georgia Code Annotated, 26–3005 (Ga. Laws 1960, pp. 142 & 193) 75

Rule III, Rules of Practice and Procedure After Plea of Guilty, etc., 292 U.S. 662 75

OTHER AUTHORITIES

Black's Law Dictionary, Third Edition, 1933, pp. 1024, 1025 19

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

NO. 147

GEORGIA, PETITIONER

vs.

THOMAS RACHEL, ET AL.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

OPINIONS BELOW

The pertinent opinions of Courts below are as follows:

The remand order and opinion of the United States District Court for the Northern District of Georgia (R. 5-9) is not reported. An Order of the United States Court of Appeals for the Fifth Circuit, staying the remand order of the district court, one judge dissenting, (R. 13-14) is not reported. The opinion of the Court of Appeals, two judges dissenting in part and concurring

in part, is reported at 342 F. 2d 336, (R. 20-35). The *per curiam* opinion of the Court of Appeals denying a rehearing *en banc*, one judge dissenting and another judge dissenting in part and concurring in part, is reported at 343 F. 2d 909 (R. 51).

JURISDICTION

The opinion and judgment of the Fifth Circuit Court of Appeals were entered on March 5, 1965 (R. 20-36). A petition for rehearing *en banc* was filed by Petitioner on March 25, 1965 (R. 37-49) and was denied by the Court of Appeals on April 19, 1965 (R. 51). The Petition for Certiorari was filed in this Court on May 15, 1965, and was granted by this Honorable Court in an order dated October 11, 1965 (R. 52).

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The judgment to be reviewed was rendered by a majority of the United States Court of Appeals for the Fifth Circuit, reversing the judgment of the United States District Court for the Northern District of Georgia in which the District Court remanded to Fultion Superior Court twenty State of Georgia criminal prosecutions which had theretofore been removed to said District Court under the purported authority of the Civil Rights Acts (28 U.S.C. 1443). The judgment of said Court of Appeals to be reviewed remanded the State Court criminal prosecutions to the United States District Court with directions to hold an evidentiary hearing and to dismiss the prosecution if one finding of fact was made.

CONSTITUTIONAL PROVISIONS, RULES, AND STATUTES INVOLVED

The First and Fourteenth Amendments to the Constitution of the United States of America are involved.

The Statutes and Rules involved are the following:

1. Act of 1866 (14 Stat. 27, 28)
2. Act of 1875 (18 Stat. 470, 472)
3. Act of 1887 (24 Stat. 553, 555)
4. Former sections 71, 74, 76, former Title 28 U.S.C. (March 3, 1911, 36 Stat. 1094, 1096, 1097)
5. Act of February 24, 1933, c. 119, 47 Stat. 904
6. Act of March 8, 1934, c. 49, 48 Stat. 399
7. Act of June 29, 1940, c. 445, 54 Stat. 688
8. Act of November 21, 1941, c. 492, 55 Stat. 776
9. Act of June 25, 1948, c. 645, 62 Stat. 683, pp. 844-845
10. Sections 1443 (1) (2); 1446 (a), (c), (d); and 1447 (c) and (d), Title 28, U.S.C. (62 Stat. 938, 1948, 63 Stat. 102, 1949); Section 2107 Title 28 U.S.C.
11. Civil Rights Act of 1964, Secs. 201 (b) (2) and 203, 78 Stat. 241 (pp. 289-291)
12. Sections 3731, 3732 and 1404, Title 18, U.S.C.
13. Section 1981, Title 42 U. S. C.
14. Revised Statutes, Title XIII, the Judiciary, Sec. 641

15. Rules 37 (a) (2), 54 (b) (1), 45 (a), and 59, Title 18, U. S. C.

16. Rule 73 (a), Title 28, U. S. C.

17. Georgia Code Annotated, 26-3005 (Ga. Laws 1960, pages 142 and 143)

18. Rule III, Rules of Practice and Procedure After Plea of Guilty, etc. (292 U. S. 662)

The constitutional provisions, Rules, and statutes involved being somewhat lengthy, their pertinent text is set out in Appendix A for Petitioner, as authorized by Rule 40 (1) (c) or are quoted verbatim in the text of this brief.

QUESTIONS PRESENTED

I. Whether a Notice of Appeal from an order of remand of the District Court entered in twenty State Court criminal prosecutions theretofore removed to said District Court under the purported authority of 28 U.S.C. 1443 is timely, where said Notice of Appeal was not filed within ten days from the entry of said remand order, as required by Rule 37 (a) (2), Fed. R. Crim. P.

Other subsidiary questions fairly comprised within Question I are:

(a) Did the majority of the Court of Appeals err in holding that the ten day time limit for filing a notice of appeal prescribed by Rule 37 (a) (2), Fed. R. Crim. P., has no application to this case because, as held by the majority of the Court, that Rule applies only to criminal appeals after verdict, or finding of guilt, or plea of guilty?

(b) Is not Rule 37 (a) (2) specifically made appli-

cable to an appeal of a remand order entered in a removed criminal case by the provision of Rule 54 (b) (1), Fed. R. Crim. P. that the Criminal Rules apply to criminal prosecutions removed to the United States District Courts from state courts and govern all procedure after removal, except dismissal?

(c) Did the Court of Appeals have jurisdiction to entertain the appeal where the Notice of Appeal of the order of remand was filed sixteen days after the entry of the remand order, and should not Petitioner's timely Motion to Dismiss Appeal on the grounds that the Notice of Appeal was not timely filed have been granted?

II. Assuming *arguendo* that Question I is decided adversely to Petitioner and the merits of the judgment of the Court of Appeals is reached, the following question is presented: Whether the Petition for Removal, which does not allege that any Georgia statute is unconstitutional and does not specifically allege a denial of the equal rights of the Defendants by virtue of the State statute under which they were being prosecuted in the State Court, sets forth a valid ground for removal under Section 1443, Title 28, U.S.C.

Other subsidiary questions fairly comprised within Question II are:

(a) Did the Court of Appeals err in holding that a Petition for Removal need contain only the "bare bones allegation of the existence of a right"; that the instant Petition for Removal did in fact allege the denial of protected rights by State legislation; and that the Petition for Removal adequately alleged that the Defendants suffered a denial of equal rights by virtue of the statute under which they were being prosecuted in the State Court?

(b) Whether the Defendants are entitled to a hearing in a federal forum for the purpose of proving a denial of their rights under a law providing for their equal rights because of State legislation, under the meager allegations of the "notice-type" pleading in their Petition for Removal, and whether the District Court erred in remanding said cases to the State Court upon consideration of the allegations of the Petition for Removal alone, without ordering an evidentiary hearing.

III. Whether the majority of the Court of Appeals erred in reversing the remand order of the District Court and remanding the cases to said District Court with directions to hold a hearing, and in further holding that, if, upon such a hearing, it is established that the removal of the Defendants from the various places of public accommodation was done for racial reasons, it would become the duty of the District Court to order a dismissal of the prosecutions without further proceedings, under the holding of *Hamm v. City of Rock Hill*, 1964, 379 U. S. 306, 85 S. Ct. 384.

Other subsidiary questions fairly comprised within Question III are:

(a) Did the aforesaid directions by the majority of the Court of Appeals to the District Court misconstrue and expand the doctrine of *Hamm, supra,* to mean that all criminal prosecutions arising from removal of persons for racial reasons from places of public accommodation must be abated, without regard to any possible evidence as to the peaceful or nonpeaceful conduct of the particular Defendants involved, and did the aforesaid directions unduly limit the discretion of the District Court in de-

ciding whether the *Hamm* decision was controlling or was distinguishable on other grounds based on the possible evidence adduced at the hearing?

(b) Did the majority of the Court of Appeals err in remanding the case to the District Court with the directions aforesaid, without requiring the removing Defendants to prove in the hearing that the teachings of *Hamm* would not be applied fairly to them by the Georgia Courts if the prosecutions were remanded to the State courts?

(c) Did the majority of the Court of Appeals err in failing to affirm the District Court's order of remand, thus allowing the Courts of Georgia to apply the doctrine of the *Hamm* decision, rendered subsequent to the removal of these cases, to these prosecutions?

STATEMENT OF THE CASE

On August 2, 1963, a Grand Jury of Fulton Superior Court, Atlanta, Georgia, indicted Thomas Rachel and 19 other defendants in separate indictments for violations of Georgia Laws, 1960, pages 142 and 143, a misdemeanor. This statute is codified as 26-3005, Georgia Code Annotated (App. A, page 75).

The misdemeanor with which Thomas Rachel was charged was his failure and refusal, on June 17, 1963, to leave the premises of another, to-wit, Lebco, Inc., doing business under the name of Lebs on Luckie Street after having been requested to leave said premises by the person in charge.

The indictments returned against the other 19 defendants involved here contained identical allegations to the Rachel indictment with the exception that in some

instances the misdemeanor was alleged to have been committed on another date and at a different restaurant in Fulton County, Georgia.

On February 17, 1964, the Defendant Rachel and the 19 other Defendants filed a Petition for Removal in the United States District Court for the Northern District of Georgia, under the purported authority of Sections 1443 (1) (2) and 1446, Title 28, U. S. C. (R. 1-5)

Briefly stated, the removal petition alleged that the State of Georgia by statute was perpetuating customs and serving members of the Negro race in places of public accommodation on a racially discriminatory basis, and on terms and conditions not imposed on the white race. They further alleged that they were being prosecuted for acts done under color of authority derived from the Constitution and laws of the United States, and for refusing to do an act inconsistent therewith. (R. 1-5)

The next day after filing of the removal petition, i.e., on February 18, 1964, United States District Judge Boyd Sloan issued an opinion and order remanding said cases to Fulton Superior Court, stating in part, "the petition for removal to this Court does not allege facts sufficient to justify the removal which has been effected." (R. 5-9)

On March 5, 1964, the Defendants filed a Notice of Appeal from the order of remand to the Fifth Circuit Court of Appeals. (R. 9)

The Defendants filed with the Fifth Circuit Court of Appeals a Motion for Stay Pending Appeal, on March 12, 1964.

On March 12, 1964, a hearing was held before a three

Judge panel of the Fifth Circuit Court of Appeals on the motion for stay of the remand order of the District Court. Petitioner, the State of Georgia, filed a Motion to Dismiss Appeal on two grounds: (1) that the remand order of the District Court was not reviewable on appeal or otherwise, and (2) the Notice of Appeal was not timely filed, having been filed more than ten days from date of the remand order. (R. 10-13)

After an oral hearing, the majority of the Fifth Circuit Court of Appeals by a 2-1 division granted the stay. District Judge G. Harrold Carswell, Northern District of Florida, dissented, saying, "I would, therefore, grant appellee's motion to dismiss." (R. 13-14)

Thereafter, after extensive oral argument before the Court of Appeals (R. 19), said Court on March 5, 1965, entered an opinion by a divided three-judge Court reversing the judgment of the District Court, and remanding the case to the lower Court with instructions to hold a hearing and to dismiss the prosecutions, if it is established that the removal of the Defendants from the various places of public accommodation was done for racial reasons. Two Judges dissented in part and concurred in part. (R. 20-35)

A timely Petition for Rehearing En Banc was filed by the State of Georgia, Petitioner (R. 37-49) and was denied in a *per curiam* opinion of the Court of Appeals entered on April 19, 1965, with one Judge dissenting and another Judge dissenting in part and concurring in part (R. 51).

This Honorable Court granted certiorari in an order dated October 11, 1965 (R. 52)

The jurisdiction of the Court of first instance, the

United States District Court for the Northern District of Georgia, was invoked by the removing Defendants under the purported authority of Sections 1443 and 1446 (c) (d), Title 28, U.S.C. (R. 4, 5).

SUMMARY OF ARGUMENT

I

Only three very basic and important grounds for reversal are urged by Petitioner. First, the Court of Appeals had no jurisdiction to consider the appeal, inasmuch as the Notice of Appeal of the order of remand was filed six days too late. The majority of the Court of Appeals has held, in the first opinion known to counsel for Petitioner since the 1948 enactment of Title 18, U.S.C., that the ten-day time limit of Rule 37 (a) (2), Fed. R. Crim. P. for filing a notice of appeal from an order in a criminal case applies only to criminal appeals after verdict, or finding of guilt, or plea of guilty. This novel construction of one of the basic Criminal Rules originally promulgated by this Honorable Court and subsequently incorporated by reference in an Act of Congress in 1948, alone demands reversal. One Judge of the panel dissented on this ground alone both in the opinion on the merits and on the petition for rehearing.

II

Secondly, the Petition for Removal completely fails, according to all federal judicial precedent, to set out a valid ground for removing State prosecutions to a federal district court for trial. Petitioner urges that there is no requirements for a hearing of the allegations of the removal petition and that removability must stand or fall upon the allegations of the petition. All federal case precedent, including that of this Honorable Court, sup-

port this position, and Petitioner strongly maintains that no error was committed by the District Court in remanding the cases without an evidentiary hearing. The remand order of the District Court should have been affirmed.

III

(a) Finally, even if Petitioner's first two grounds are decided adversely to us, the Court of Appeals should be reversed because the majority opinion has directed the District Court to look for only one criteria on the hearing, and to dismiss the *State Court prosecutions* if that single element is found from the evidence. That element is, of course, the finding that racial reasons were the cause of the removal of the *Rachel, et al,* defendants from the various restaurants. This virtual mandate to the District Court unduly limits his judicial discretion in considering whether or not the prosecutions are in fact controlled by *Hamm,* supra. Many distinguishing factors might be raised by the evidence on such a hearing. Were the defendants peaceable and non-violent in their demonstrations? Were the restaurants places of public accommodation coming under the purview of the Civil Rights Act of 1964? Under the directions of the Court of Appeals, the District Court could consider none of these factors, if the racial factor alone were found.

(b) Further, the Court of Appeals by its remand to the District Court with directions ignores the fact that the Supreme Court of Georgia has recognized and followed the *Hamm decision* and has abated five similar State Court prosecutions. *Bolton, et al* v. *State of Georgia,* 220 Ga. 632, decided February 8, 1965. The *Hamm* case had not been decided when these (*Rachel, et al*) prosecutions were pending in the Georgia Courts, and the Georgia Courts have not had an opportunity to consider

these cases in connection with the *Hamm* doctrine. They should be afforded that opportunity, as pointed out by Circuit Judge Bell in his partial dissent (R. 35). The action of the majority of the Court of Appeals amounts to a finding that the Courts of Georgia will not apply *Hamm* fairly to these Defendants before such courts have even been given the opportunity to do so. This casual treatment of the Georgia Courts involves jeopardy to our dual system of courts, state and federal, as pointed out by Circuit Judge Bell. (R. 35). Petitioner feels that, if these cases are remanded to the District Court for a hearing, contrary to Petitioner's other grounds, *at the very least* these Defendants should be required to prove that the Georgia Courts will not treat them fairly, in he light of *Hamm*. If they cannot prove this, the cases should be remanded to the State Courts. The District Court should not have its hands tied by the erroneous directions of the majority of the Court of Appeals, in limiting the hearing to one issue only.

(c) Counsel for Petitioner are not concerned in this brief with the merits of the State Court prosecutions against these Defendants, and as to the eventual outcome of same if they are remanded to the State Courts. We *are* deeply concerned with the grave and highly important constitutional question of whether a federal appellate court should accept jurisdiction over State Court criminal prosecutions and virtually order dismissal of the actions, without ever giving the State Courts a chance to reconsider the cases in the light of the latest decision from this Honorable Court. Particularly is this so in view of the *Bolton* decision by the highest Court of Georgia, which proves conclusively that Georgia Courts are following the decisions of the United States Supreme Court in racial controversies.

For the foregoing reasons, Petitioner respectfully insists that the decision of the Fifth Circuit Court of Appeals should be reversed.

ARGUMENT

I. THE NOTICE OF APPEAL OF THE REMAND ORDER WAS NOT TIMELY FILED AND PETITIONER'S TIMELY MOTION TO DISMISS APPEAL SHOULD HAVE BEEN GRANTED

The Court of Appeals, Judge Whitehurst dissenting, held that Rule 37 (a) (2) applies only to criminal appeals "after verdict or finding of guilt . . . or plea of guilty," citing *Nye* v. *United States,* 1941, 313 U. S. 28, 43-44. Therefore, the Court held, that Defendants' notice of appeal was timely, even though filed sixteen days after entry of the remand order. Petitioner respectfully maintains that this was erroneous.

(a) Rule 37 (a)(2) controls the time limit for filing a notice of appeal in a criminal case both before and after verdict.

The history of the creation of the Rules of Criminal Procedure require application of Rule 37 (a) (2) to the instant case.

By the Act of March 8, 1934, c. 49, 48 Stat. 399, amending the Act of February 24, 1933, c. 119, 47 Stat. 904, the Supreme Court was given authority to prescribe "rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty in criminal cases . . ."

Pusuant to the above Act, the Supreme Court by order

dated May 7, 1934 and entitled "Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in criminal cases brought in the District Court of the United States and in the Supreme Court of the District of Columbia" adopted thirteen rules as the "Rules of Practice and Procedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, in criminal cases in District Courts of the United States . . . and in all subsequent proceedings in such cases in the United States Circuit Court of Appeals . . . and in the Supreme Court of the United States." 292 U.S. 661.

The 1934 "after verdict" enabling act did not require the Court to submit these rules to Congress; they were therefore made effective September 1, 1934 by the Court.

Rule III of these rules, and the predecessor to Rule 37 (a) (2), provided in part that "An appeal shall be taken within 5 days after entry of *judgment of conviction* . . ." 292 U. S. 662 (emphasis added)

It is clear that Congress, under the 1934 Act, intended the Supreme Court to promulgate only "after verdict" rules. It is equally clear that the Supreme Court intended the rules adopted May 7, 1934 to apply only to "after verdict" cases. This is manifested by the title of the order adopting the rules, and by the language of Rule III limiting appeals to those cases where there has been a judgment of conviction. If there were no judgment of conviction there could be no appeal as the case had not yet reached the necessary "after verdict" stage. Of course, in such circumstances the 5 day period for appeal was inapplicable.

By the Act of June 29, 1940, c. 445, 54 Stat. 688, Con-

gress gave the Supreme Court the authority to prescribe Rules of Criminal Procedure for the District Court of the United States governing poceedings in criminal cases prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty. The Act also required the submission of these rules to Congress. Under the authority of this Act, the Supreme Court promulgated Rules 1-31 and 40-60 by order dated December 26, 1944. 323 U. S. 821. The Supreme Court, by letter dated December 26, 1944, requested the Attorney General of the United States to report these rules to the next regular session of Congress. 327 U. S. 823. This was done by a Letter of Submittal from the Attorney General of the United States to Congress, dated January 3, 1945. 327 U. S. 824. The first regular session of Congress adjourned on December 21, 1945. The rules therefore became effective on March 21, 1946 as provided by Rule 59.

By Order dated February 8, 1946 the Supreme Court prescribed rules 32-39 pursuant to the "after verdict" enabling Act of 1933, as amended. The Court made those rules effective on the same date rules 1-31 and 40-60 became effective. The Court further ordered that both the "prior to verdict" rules and the "after verdict" rules be consecutively numbered and known as the Federal Rules of Criminal Procedure, 327 U. S. 825. Rules 32-39 were not submitted to Congress. There was no need to submit them. The 1933 Act, as amended, did not require submission of the rules for them to become effective.

It is obvious from the February 8, 1946 order that the Supreme Court intended Rules 1 through 60 to serve as a complete set of Rules to govern criminal proceedings. This is manifested by all of the Rules becoming effective on the same date, and by the fact that the Court titled the

rules as the Federal Rules of Criminal Procedure. If these rules were intended to be separated into two sets, one embracing "verdict and before verdict" proceedings and the other "after verdict" proceeding, as Judge Tuttle, speaking for the majority of the Court of Appeals, advocates, it is doubtful that the court would have gone to the difficulty of making them effective on the same day. It is even more doubtful that the Court would order the rules numbered consecutively or title them the Federal Rules of Criminal Procedure. It seems more reasonable to believe the court would have kept the "before verdict" rules separate from the "after verdict" rules and titled them as such. This reasoning is further supported by the fact that the old rules I through XIII now replaced by Rules 32-39 were in fact known as the "Rules of Practice and Procedure, after plea of guilty, verdict or finding of guilt, in Criminal Cases . . ."

The Supreme Court had the authority under the 1933 and 1940 enabling Acts to prescribe all rules to govern any and all proceedings in a criminal case. It is obvious from its above described actions that this Court intended Rules 1 through 60 to serve all criminal proceedings before and after verdict, without regard to which enabling act authorized promulgation of a particular rule.

If a distinction as to the application of Rules 1-31 and 40-60, and Rules 32-39 ever existed because the 1940 Act required submission of the rules to Congress and the 1933 Act did not, it no longer exists. There is no merit in the contention that Rules 32 through 39 have not been submitted to Congress. By the Act of June 25, 1948, c. 645, 62 Stat. 683, entitled "An Act to Revise, Codify, and Enact into Positive Law Title 18 of the United States Code," Congress enacted into law all sixty

Federal Rules of Criminal Procedure. Rule 37 (a) (2) is specifically incorporated by reference under Section 3732 on page 845 of that Statute. Clearly Congress intended the Federal Rules of Criminal Procedure to apply to all criminal proceedings, whether before or after verdict.

Petitioner's viewpoint is further supported by the language of Rule 37 (a) (2), which reads as follows:

> "2. *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare and file forthwith a notice of appeal on behalf of the defendant. *An appeal by the government when authorized by statute may be taken with 30 days after entry of the judgment or order appealed from*" (Emphasis added)

The last sentence allows thirty days for an appeal by the government when authorized by Statute. 18 U.S.C. 3731 (App. A, p. 66) authorized appeal by the government in criminal cases in the following instances:

(1) from a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof;

(2) from a decision arresting a judgment of conviction for insufficiency of the indictment or information;

(3) from a decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

One and three of the foregoing are *"before verdict appeals."* The government is also authorized a *"before verdict appeal"* of an order suppressing evidence in a narcotics case and in certain internal revenue cases. (18 U.S.C. 1404). In fact it is the rule rather than the exception that the government's right to appeal is in "before verdict" circumstances. If Rule 37 (a) (2) applies only to "after verdict" situations as urged by the Court of Appeals, why does the last sentence of the Rule deal with "before verdict" appeals? The Court of Appeals' reasoning becomes even more illogical when combined with their interpretation of the 1933 and 1940 enabling Acts. Accept for the moment *arguendo* that Rules 32 through 39 applied only to "after verdict" rules and that 1-31 and 40-60 applied only to "prior to and including verdict" rules. (This of course ignores the 1948 Act codifying the Rules). Since Rule 37 (a) (2) was promulgated under the "after verdict" enabling Act of 1933, the last sentence of the rule dealing with Appeals by the government must be limited to "after verdict" appeals only. Therefore, Rule 37 (a) (2) would be a nullity as to "before verdict" appeals as authorized by 18 U.S.C. 3731 and 18 U.S.C. 1404. Clearly such appeals are authorized.

In *United States* v. *Williams* (4th Cir. 1955) 227 F.2d 149, the Defendant was charged with removing and concealing non-tax paid whiskey. After defendant's motion to suppress evidence had been sustained and the indictment dismissed the Government appealed, but did so more than 30 days after entry of the order. The Fourth Circuit Court of Appeals dismissed the appeal, holding:

> "The order was not a final order made in a civil proceeding, from which an appeal would lie and from which the government would have 60 days in

which to take an appeal, but an order in a criminal proceeding. . . . In so far as it (the order of the lower court) ordered a dismissal of the indictment in the case, it (the appeal) was not taken within 30 days and must be dismissed for that reason under Rule 37 of the Federal Rules of Criminal Procedure. 18 U.S.C.A." (Explanatory words added)

Petitioner's interpretation of Rule 37 (a) (2) is further strengthened by comparing it with its predecessor, Rule III. This rule allowed only for appeal ". . . after entry of *judgment of conviction.*" Rule 37 (a) (2) allows appeal ". . . after entry of the judgment or order appealed from, . . ." Surely if the court had intended Rule 37 (a) (2) to apply only to "after verdict" situations it would have retained the language, "judgment of conviction." By broadening the language to "judgment or order appealed from" the Court removed the "after verdict" limitation. A judgment may be defined as "a decision of a court of justice upon respective rights and claims of the parties to an action." (*Black's Law Dictionary,* Third Edition, 1933, page 1024) Judgments are classified according to the time or stage of the action when rendered. (*Black,* supra, p. 1025). A judgment may be final or interlocutory. An order may be defined as "every direction of a Court or a Judge made or entered in writing." (*Black,* supra, p. 1298). An order may be final or interlocutory. Therefore, the use of the general terms "judgment" and "order" can not be construed in Rule 37 (a) (2) as a "judgment of conviction" limiting appeal to "after verdict" situations only.

Judge Tuttle bases his opinion for the majority of the Court that Rule 37 (a) (2) is inapplicable on *Nye* v. *United States,* 1941, 313 U.S. 28, 43-55. *Nye* is not controlling. It was decided before the Federal Rules of

Criminal Procedure were adopted. *Nye* was not concerned with Rule 37 (a) (2) but rather with its predecessor, Rule III, which we have seen was limited to "after verdict" appeals. Further, *Nye* was an adjudication of a criminal contempt arising out of a civil case. In deciding that the Criminal Appeals Rules then in effect did not apply to criminal contempt cases, the Supreme Court held that these Rules

> "... were adopted as the Rules of Practice and Procedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived in criminal cases (292 U.S. 661). In this case there was no plea of guilty, there was no verdict of guilt by a jury, and there was no finding of guilt by the court where a jury was waived. It is our view that the rules describe the kinds of cases to which they are to be applied."

This holding is correct. The words of limitation in Rule III are "entry of Judgment of Conviction." It is clear from the title of these Rules and the language of Rule III that Rule III would not apply to an appeal before a judgment of conviction.

The title of the current Rules and Rule 37 (a) (2) are void of any language limiting application to "after verdict" cases. Following the *Nye* reasoning it is logical to conclude that Rule 37 (a) (2) does apply to "before verdict" situations since the language in the title and Rule 37 (a) (2) limiting application to "after verdict" appeals has been deleted.

As mentioned above, *Nye* was decided when Rule III was in effect. The whole history of the promulgation of Rule 37 (a) (2) and the Federal Rules of Criminal Procedure presents such a changed picture from the factual

situation presented at the time of the *Nye* decision as to refute any contention that it is controlling authority for the proposition that Rule 37 (a) (2) applies only to "after verdict" cases. Also, *Nye* has been interpreted merely as standing for the proposition that the Criminal Appeals Rules did not apply to a criminal contempt case. See *Moore* v. *United States* (10 Cir. 1945), 150 F.2d 323, cert. den. 326 U.S. 740; *United States* v. *Lederer* (7 Cir. 1943) 139 F. 2d 861. This interpretation finds strength in the Act of November 21, 1941, C. 492, 55 Stat. 776 which provided that the rules would apply to criminal contempt proceedings.

(b) Rules 54 (b) (1) and 59 of the Federal Rules of Criminal Procedure require application of Rule 37 (a) (2) to the instant case.

Rule 54 (b) (1) reads as follows:

> "*Removal Proceedings* These rules apply to criminal prosecutions removed to the district courts of the United States from state courts and *govern all procedures after removal,* except that dismissal by the attorney for the prosecution shall be governed by state law." (Emphasis added)

The instant case is a criminal prosecution, begun in the Superior Court of the State of Georgia. It was removed by the defendants to the United States District Court for the Northern District of Georgia. Clearly, then Rule 54 (b) (1) applies. The phrase "govern *all* procedure after removal" must include any appeal of a remand order. A remand order can not be issued until after a case has been removed from State to Federal Court. It can not be said that appeal of a remand order is an exception to Rule 54 (b) (1) because the rule provides for only one exception, dismissal by the prosecuting attorney.

Applying the principle of *Inclusio unius est exclusio alterius*, the listing of one exception excludes all other exceptions. If appeal of a remand order were to be an exception of Rule 54 (b) (1), it would have been so stated in the Rule.

The last sentence of Rule 59 states that the Rules shall ". . . govern *all* criminal proceedings thereafter commenced . . ." To hold that Rule 37 (a) (2) does not apply to an appeal of a remand order in a criminal case ignores and contradicts the specific requirement of Rule 54 (b) (1) and the general requirement of Rule 59. The opinion of the Court of Appeals that Rule 37 (a) (2) is not applicable flies in the teeth of Rule 54 (b) (1) and can only circumvent Rule 59 by a finding that the proceedings removing the case to Federal court was civil rather than criminal. But the proceedings are criminal in nature. They are made so by Rule 54 (b) (1). They are also made so by decisions of the court. The facts of the instant case meet even the requirements of a criminal proceeding set forth by Judge Tuttle in *Zacarias* v. *United States*, 5 Cir., 1958, 261 F.2d 416. The Court of Appeals held in that case that a motion to suppress evidence brought after the defendant had been arrested, taken before a U. S. Commissioner where a complaint was filed against him, and bound over to the grand jury, was incidental to the criminal proceeding already commenced and pending. An indictment had not yet been returned against the defendant. Since the motion was ancillary to the criminal proceeding, it was held to be interlocutory and not directly appealable. The appeal was dismissed by the Fifth Circuit Court of Appeals.

The point at which a criminal proceeding begins was more fully explored by the Fifth Circuit Court of Ap-

peals in *United States* v. *Koenig*, 1961, 290 F.2d 166. Here, the government was attempting to appeal from an order sustaining a motion to suppress evidence seized. The Court held that the government could not appeal because . . . "an order to suppress has no finality because it does not of itself terminate the criminal proceedings". Certainly removal of a criminal case from State to Federal court does not terminate the criminal proceedings. The Supreme Court of the United States granted certiorari in *Koenig* and decided it together with *DiBella* v. *United States*, 1962, 369 U. S. 121. The Court said in part, at page 128:

> "... 'the final judgment rule is the dominant rule in federal appellate practice'. 6 *Moore, Federal Practice* (2d ed. 1953) 113. Particularly is this true of criminal prosecutions. See, e.g., *Parr* v. *United States*, 351 U.S. 513, 518-521. Every statutory exception is addressed either in terms or by necessary operation solely to civil actions. Moreover, the delays and disruptions attendant upon intermediate appeal are especially inimical to the effective and fair administration of the criminal law. The Sixth Amendment guarantees a speedy trial. Rule 2 of the Federal Rules of Criminal Procedure counsels construction of the Rules 'to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay'; Rules 39 (a) and 50 assign preference to criminal cases on both trial and appellate dockets".
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> * * * * *
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> "We should decide the question here — we are free to do so — with due regard to historic principle and to the practicalities in the administration of criminal justice. An order granting or denying a pre-indictment motion to suppress does not fall within any class of independent proceedings other-

wise recognized by this Court, and there is every practical reason for denying it such recognition. To regard such a disjointed ruling on the admissibility of a potential item of evidence in a forthcoming trial as the termination of an independent proceeding with full panoply of appeal and attendant stay, entails serious disruption to the conduct of a criminal trial.[8] The fortuity of a preindictment motion may make of appeal an instrument of harassment, jeopardizing by delay the availibility of other essential evidence." (at page 129).

"Presentations before a United States Commissioner, *GoBart Co.* v. *United States,* 282 U.S. 344, 352-354, as well as before a grand jury, *Cobbledick* v. *United States,* 309 U. S. 323, 327, are parts of the federal prosecutorial system leading to a criminal trial. Orders granting or denying suppression in the wake of such proceedings are truly interlocutory, for the criminal trial is then fairly in train. When at the time of ruling there is outstanding a complaint, or a detention or release on bail following arrest, or an arraignment, information, or indictment — in each such case the order on a suppression motion must be treated as 'but a step in the criminal case preliminary to the trial thereof'. *Cogen* v. *United States,* 278 U. S. 221, 227. Only if the motion is solely for return of property and is in no way tied to a criminal prosecution *in esse* against the movant can the proceedings be regarded as independent. See *Carroll* v. *United States,* 354 U. S. 394, 404 n. 17; *In re Brenner,* 6 F. 2d 425 (C.A. 2d Cir. 1925)."

Petitioner urges that the instant case had proceeded so

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[8] "It is evident, for example, that the form of independence has been availed of on occasion to seek advantages acquired by the rules governing civil procedure, to the prejudice of proper administration of criminal proceeding, e.g., *Green* v. *United States,* 296 F 2d 841, 843-855 (C. A. 2d Cir., 1961) (extended time for appeal)."

far within the doctrine of *DiBella, Koenig* and *Zacarias, supra,* that the removal to federal court was but a step in the criminal train. The defendants had already passed the steps of arrest, commitment hearing and indictment. The State of Georgia was proceeding at full speed to give the defendants their day in court when the cases were removed to federal court. The first case was to be tried on February 17, 1964 (R. 4), the same day the removal petition was filed. Removal to federal court does not dismiss or dispense with prosecution. It merely changes the forum. No independent right is involved and the defendants can not qualify the removal as not being tied to the prosecution *in esse* as required by *DiBella.* In fact the Supreme Court has held that removal is merely a step in a criminal proceeding, therefore interlocutory and not directly appealable. In *Parr* v. *United States,* 351 U. S. 513 (1956), the defendant was indicted in one division of the Federal District Court and that court granted his motion to transfer the case to another division, on the ground that local prejudice would prevent a fair trial in the division where he was indicted. The government then obtained a new indictment for the same offenses in another district and moved in the first court for a dismissal of the first indictment. The dismissal was granted and the defendant appealed. The Court stated, in holding that the order was not appealable because it was not final, that:

> "'Final judgment in a criminal case means sentence. The sentence is the judgment.' *Berman* v. *United States,* (302 U. S. 211). And viewing the two indictments together as a single prosecution . . . the petitioner has not yet been tried, much less convicted and sentenced. The order dismissing the (first) indictment was but an interlocutory step in

> this prosecution and its review must await the conclusion of the 'whole matter litigated' between the Government and the petitioner (defendant)—namely 'the right to convict the accused of the crime, charged in the indictment'. *Heike* v. *United States*, 217 U.S. 423, at p. 429" (Explanatory words added).

The Court further held that since the order dismissing the first indictment was but a " 'step toward final disposition of the merits of the case' " it would " 'be merged in the final judgment;' " citing *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U. S. 541, at p. 546.

The Supreme Court added (351 U. S. at 519):

> "The lack of an appeal now will not deny effective review of a claim fairly severable from the context of a larger litigious process. *Swift & Company Packers* v. *Compania Columbiana de Caribe,* (339 U.S. 684.) at p. 689. True, the petitioner will have to hazard a trial under the Austin (second) indictment before he can get a review of whether he should have been tried in Laredo under the Corpus Christi (first) indictment, but 'bearing the discomfiture and cost of a prosecution for crime even by an innocent person is one of the painful obligations of citizenship.' *Cobbledick* v. *United States,* supra, at p. 325." (Explanatory words added)

See also, *Chicago etc. R. Co.* v. *Roberts,* 1891, 141 U. S. 690 which held that a remand order was not appealable because it was not a final order. In fact under 28 U. S. C. 1447 (d) no remand order was appealable until amended by the Civil Rights Act of 1964 giving for the first time the right to appeal a remand order in civil and criminal cases involving civil rights. Based upon the foregoing the removal must be viewed as but a part of the criminal proceeding. If the Defendants had been denied the right to appeal the remand order of the District Court an ef-

fective review could still have been had on appeal on the merits of the case.

If the removal of the instant case to federal court was part of the criminal proceeding, should not the Federal Rules of Criminal Procedure apply to its appeal?

The Petitioner unequivocally contends that these principles of law, and therefore Rule 37 (a) (2) must be applied to the case at hand.

Judge Tuttle, in holding that Rule 37 (a) (2) is inapplicable does not state what Rule or statute does govern the time limit for filing the Defendants' notice of appeal. Surely he would not advocate a limitless time to appeal. Therefore he must have applied either Rule 73 (a), Fed. R. Civil P. or Section 2107, Title 28, U. S. C. to hold this appeal timely, it being filed sixteen days after the remand order.

28 U. S. C. 2107 reads as follows:

2107 Time for appeal to courts of appeals.

"Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a *civil nature* before a Court of Appeals for review unless notice of appeal is filed within 30 days after entry of such judgment, order or decree." . . . (As amended May 24, 1949, c. 139, 107, 108, 63 Stat. 104) (Emphasis added)

The rule expressly provided that the action must be of a *civil nature*. Following the rulings of *Parr, DiBella, Koenig,* and *Zacarias,* all *supra,* the Petitioner respectfully urges that the instant case is not of a civil nature and therefore neither Rule 73 (a), Fed. R. Civil P. nor 28 U. S. C. 2107 can apply.

Forgetting for the moment Rule 37 (a) (2) of the

Criminal Rules, Rule 73 (a) of the Civil Rules and 28 U. S. C. 2107, should the Rules of Civil Procedure and the Rules of Criminal Procedure be intermingled at all? Counsel for Petitioner think not.

> "At times in our system the way in which courts perform their function becomes as important as what they do in the result. In some respects matters of procedure constitute the very essence of ordered liberty under the Constitution.
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> "I do not think the Constitution contemplated that there should be in any case an admixture of civil and criminal proceedings in one. Such an idea is foreign to its spirit.
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> "The founders did not command the impossible. They could not have conceived that procedures so irreconcilably inconsistent in many ways could be applied simultaneously. Nor was their purpose to create any part of judicial power,. . . wholly at large, free from any constitutional limitations or to pick and choose between the conflicting civil and criminal procedures and remedies at will. Much less was it to allow mixing civil remedies and criminal punishments in one lumped form of relief, indistinguishably compounding them and thus putting both in unlimited judicial discretion, with no possibility of applying any standard of measurement on review". Mr. Justice Rutledge, dissenting in *United States* v. *United Mine Workers of America*, 1947, 330 U. S. 258, pp 363-365.

To hold that Rule 37 (a) (2) does not apply to the case at hand contravenes every ruling of the Supreme Court and the purpose for creating the Federal Rules of Criminal Procedure. It would cause chaos in the orderly and impartial administration of justice in criminal cases.

(c) An appeal not timely filed confers no jurisdiction upon the Court of Appeals

Applying Rule 37 (a) (2), the Defendants' appeal was not timely filed. Defendants' notice of appeal was filed sixteen days after entry of the remand order. A notice of appeal in a criminal case not filed within the 10 day time limit required by Rule 37 (a) (2) confers no jurisdiction upon the Court of Appeals. *United States* v. *Robinson*, 1960, 361 U. S. 220; *Berman* v. *United States*, 1964, 378 U. S. 530.

Nowhere in this record is this Honorable Court shown any reason or excuse for the late filing of the notice of appeal. One can only surmise that these defendants, or their counsel, have slept on their right to appeal. Realizing too late that the 10 day time limit of Rule 37 (a) (2) had pasted before their notice of appeal was filed, the Defendants are trying frantically to justify the sixteen day interval as proper and to "stay in court". However, even they did not urge the novel construction given Rule 37 (a) (2) by the Court of Appeals.

For the foregoing reasons, the Court of Appeals erred in holding this appeal to be timely. Therefore, Petitioner's timely Motion to Dismiss Appeal should have been granted, as District Judge Whitehurst, sitting as a member of the Fifth Circuit panel hearing this appeal, has insisted in dissenting opinions both on the merits and on the petition for rehearing.

II. THE PETITION FOR REMOVAL DOES NOT SET OUT ANY VALID GROUND FOR REMOVAL.

(a) There is nothing in the Petition for Removal to warrant the exercise of Federal jurisdiction.

Petitioner respectfully maintains that the Petition for Removal is completely devoid of any valid ground for removal of these criminal prosecutions from State to Federal court. What it *does not contain* is more important than the skimpy allegations set forth. The Petition for Removal (R. 1-5) does *not* allege (1) that any statute or law of the State of Georgia is unconstitutional (2) that any civil right, or the enforcement thereof, of the Defendants is destroyed by any statute of the State of Georgia or by its Constitution (3) that any statute of the State of Georgia, or its Constitution creates an inability on the part of Defendants to enforce in the Courts of Georgia their equal civil rights under the United States Constitution.

Furthermore, there is a complete failure in the Petition for Removal to set out sufficient *facts* to support a removal. Only bare allegations are made that certain Defendants sought service, food, entertainment and comfort in certain restaurants and hotels in Atlanta, Georgia, and were arrested pursuant to Georgia Code Annotated 26-3005. Then appears a mere conclusionary allegation that these arrests were effected for the sole purpose of perpetuating customs and usages of the City of Atlanta with respect to serving and seating Negroes, and white persons accompanying Negroes, in places of public accommodation upon a racially discriminatory basis. They allege, in a pure conclusion, that they cannot enforce their rights in the Georgia courts, but do not allege a single *fact* showing why they cannot do so. They

do not specify one single Georgia law which prevents enforcement of their rights in the State courts. Moreover, they do not allege that any judge, law enforcement officer, prosecuting attorney, or other officer of the State of Georgia has in any way violated any of their civil rights, or prevented them from asserting any of such rights. In other words, there is no allegation of improper conduct by any State official. Even if such allegations *were* contained in the Petition for Removal, many federal decisions hold that such allegations would not justify removal. This woefully inadequate removal petition was everything that the District Court had before him when he considered, on his own motion as it was his duty to do, the question of whether a cause for removal was shown.

Petitioner will discuss briefly just a few of the controlling cases which illustrate beyond the shadow of a doubt that this case is not removable under any possible construction of the Petition for Removal.

In *Virginia* v. *Rives,* 1879, 100 U. S. 313, where two Negroes removed their pending State trial for murder to federal court, and the State of Virginia filed a petition for mandamus to the United States Supreme Court to force the remand of said cases, Justice Strong said, in part, for the Court, in granting the petition for mandamus:

> "... *But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him.* When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to remove

his case. By the express requirement of the statute his *petition must set forth the facts upon which he bases his claim to have his case removed,* and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial." (Emphasis added)

Virginia v. *Rives,* supra, holds categorically that a case is not removable under the civil rights acts (the predecessor of 28 U.S.C. 1443) unless a State Constitution or Statute on its face denies the removing defendant his federal constitutional rights. In other words, there must be *discriminatory state legislation* depriving him of those rights before he can remove the case. Since that time, federal courts have followed that rule without deviation or modification. To list just a few, Petitioner cites *Kentucky* v. *Powers,* 1906, 201 U. S. 1; *Williams* v. *Mississippi,* 1898, 170 U. S. 213; *Murray* v. *Louisiana,* 1896, 163 U. S. 101; *Gibson* v. *Mississippi,* 1896, 162 U. S. 565; *Smith* v *Mississippi,* 1896, 162 U. S. 592; *Hull* v. *Jackson County Circuit Court,* 6 Cir., 1943, 138 F. 2d 820; *Snypp* v. *Ohio,* 6 Cir. 1934, 70 F. 2d 535, cert. den. 293 U. S. 563; *Arkansas* v. *Howard,* D.C. E.D. Ark., 1963, 218 F. Supp. 626; *North Carolina* v. *Jackson,* D.C. M.D. N.C., 1955, 135 F. Supp. 682; *Hill* v. *Pennsylvania,* D.C. W.D. Pa., 1960, 183 F. Supp. 126; *Texas* v. *Doris,* D.C., S.D. Texas, 1938, 165 F. Supp. 738; and *Neal* v. *Delaware,* 1880, 103 U.S. 370. Each of the foregoing was a criminal case, and removal was sought in each under the civil rights act.

The *Kentucky* v. *Powers* case, supra, appears to be the last Supreme Court ruling on exactly what grounds will authorize a removal under color of the civil rights acts,

and it has been followed in every instance by the lower federal courts in the cases previously cited in this section of this Brief. In *Powers*, supra, the Supreme Court said, (201 U. S. at page 30):

> "The question as to the scope of section 641 of the Revised Statutes again rose in the subsequent cases of *Neal* v. *Delaware*, 103 U. S. 370, 386; *Bush* v. *Kentucky*, 107 U. S. 110, 116; *Gibson v. Mississippi*, 162 U. S. 565, 581, 584, and *Charley Smith* v. *Mississippi*, 162 U. S. 592, 600. In each of these cases it was distinctly adjudged, in harmony with previous cases, that the words in section 641 — 'who is denied or cannot enforce in the judicial tribunals of the State or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States' — did not give the right of *removal*, unless the constitution or the laws of the State in which the criminal prosecution was pending denied or prevented the enforcement in the judicial tribunals of such State of the equal rights of the accused as secured by any law of the United States. Those cases, as did the prior ones, expressly held that there was no right of *removal* under section 641, where the alleged discrimination against the accused, in respect of his equal rights, was due to the illegal or corrupt acts of administrative officers, unauthorized by the constitution or laws of the State, as interpreted by its highest court. For wrongs of that character the remedy, it was held, is in the state court, and ultimately in the power of this court, upon writ of error, to protect any right secured or granted to an accused by the Constitution or laws of the United States, and which has been denied to him in the highest court of the State in which the decision, in respect of that right, could be had."

Petitioner maintains that the *Powers* case still controls the federal case law on this question of removability, and that it has not been altered, modified, or watered-down by any subsequent decision of the Supreme Court, or any inferior federal court, except by the Fifth Circuit in this case, and in *Peacock* v. *City of Greenwood*, 347 F.2d 679, (1965) which will be discussed later in this brief.

Thus, Petitioner has clearly shown that according to prevailing federal case law *discriminatory state legislation* which *interferes* with a constitutional right of defense by the defendant must exist before a case is removable under the civil rights acts. The Defendants' Petition for Removal does not allege this. The only statute they mention is Georgia Code Annotated, 26-3005, which simply makes it unlawful for any person who is on the premises of another to refuse and fail to leave said premises when requested to do so by the owner or other person in charge of said premises. There is nothing discriminatory about that statute, and nothing which in any manner deprives a defendant of any right of defense. The statute on its face has application to many situations other than racial ones. It authorizes prosecution of the drunken visitor in one's home, the person behaving in a disorderly manner in one's church, or the disreputably dressed, boisterous customer in a store, who refuses to leave when requested. If the gist of Defendants' complaint is that 26-3005 is being *unconstitutionally applied*, then they have no grounds for removal. Their remedy is to defend themselves through the State courts and then seek review by certiorari in the United States Supreme Court.

The Court of Appeals in their opinion impliedly rec-

ognize the lack of sufficient allegations in the removal petition. The majority refers to "the bare bones allegation of the existence of a right," and to "liberality of pleadings under the (Civil) rules." Circuit Judge Bell refers in his partially concurring and partially dissenting opinion to the removal petition as "notice type pleadings." In fact, the whole Court agreed to send the case back to the District Court to allow Defendants to prove the allegations of the removal petition, or as Judge Bell stated "to determine just what appellants do claim." (R. 35)

A brief summary of the legislative history of Paragraphs (1) and (2) of 28 U.S.C. 1443, under either of which these Defendants may attempt to justify removal of these cases, might be profitable here. In its present form Section 1443 sets out in two paragraphs circumstances under which civil actions or criminal prosecutions may be removed by the defendants to the federal district court embracing the place wherein the case is pending. These two types of cases are: (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal rights of citizens of the United States, or of all persons within the jurisdiction thereof. Hereinafter in this Brief we will refer to this Paragraph as the "denial" clause, for the sake of brevity. (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. Hereinafter we will refer to this Paragraph as the "color of authority" clause.

The forerunner of Section 1443 was Section 3 of the first Civil Rights Act, 14 Stat. 27 (1866) enacted under power of the recently adopted Thirteenth Amendment

and prior to adoption of the Fourteenth. Section 1 of the Act confers on all persons born in the United States, of every race and color and without regard to previous condition of slavery or involuntary servitude the same rights enjoyed by white persons to contract; sue and be parties; testify; inherit, hold and dispose of property; and to the full and equal benefit of all laws and proceedings for the security of person and property, and to be subject to like punishment, pains and penalties and to none other.

Section 2 of the Act of 1866 made it a crime for any person "under color of law" to deprive any person of any right secured by the Act. Section 3 was the removal provision and authorized removal of criminal and civil causes "affecting persons who are denied or cannot enforce in the courts . . . of the State . . . any of the rights secured to them by the first section of the Act." Section 3 further authorized removal of any suit or prosecution commenced in any State court against "any officer, civil or military, or other person, for any arrest or imprisonment, trespass or wrongs done or committed under color of authority derived from this Act . . . or for refusing to do any act on the grounds that it would be inconsistent with this Act."

Thus the first part of Section 3, Act of 1866, marks the first appearance of the "denial" clause, now Paragraph (1) of Section 1443, and the latter part of Section 3 is the predecessor of the "color of authority" clause, now Paragraph (2) of Section 1443.

Although the Act of May 31, 1870, 16 Stat. 140, added the safeguard of the equal rights of citizens to vote, and defined a crime for conspiracy to injure a citizen in the

exercise of Constitutional or statutory rights, it did not significantly alter the removal section of the Act of 1866.

However, in the Revised Statutes of 1875 and 1878, former Section 1 of the Act of 1866 became Title XIV, entitled "Civil Rights", in two sections, 1977 and 1978 which are now 42 U. S. C. 1981, 1982. The jurisdictional proceedings, both original and on removal, became part of Chapter 7, Title XIII, "The Judiciary". Old Section 3 of the Act of 1866 became Section 641 (See App. A, Page 72 for complete text). Both the "denial" and the "color of authority" clauses were re-worded somewhat in Section 641, although the latter still retained the words "against any officer, civil or military, or any other person."

Section 641 became Section 31, Judicial Code of 1911, 35 Stat. 1096 without any real change. However, the 1948 codification of Title 28, U. S. C. made a number of changes. Procedural details were split off into other Sections and structure was altered by dropping clauses and rearranging them. The most important changes were that the words "against any officer, etc." were dropped from the "color of authority" clause, and nothing was substituted therefor. Also, the words "arrest, imprisonment, wrongs or trespass" in that clause were shortened to "any act under color of authority."

The 1948 codification of Title 28 made a significant change in the removal right of federal officers in Section 1442. Formerly the class of persons with such removal right had been limited to officers acting under the revenue laws. (Former Section 643, Title XIII; subsequently Section 33, Judicial Code of 1911, 36 Stat. 1097.) Section 1442 (a) (2) expanded this coverage to allow removal by any federal officer, or persons acting under him

for any act done under color of such office or on account of any right claimed under any Act of Congress *for the apprehension of criminals* or collection of the revenue.

With this admittedly skimpy review of the history of present Sections 1443 (1) and (2), we will discuss four federal decisions of very recent vintage which bear directly upon the issue presented in this case. The first of these is *People of the State of New York* v. *Galamison*, 2 Cir. 1965, 342 F. 2d 255, cert. den. 85 S. Ct. 1342 (April 26, 1965), where some sixty persons were being prosecuted by the State of New York for acts committed during demonstrations conducted to publicize their grievances over "the denial of equal protection of the laws to Negroes in the City, State, and Nation with reference to housing, education, employment, police action, etc." (342 F. 2d at 257). The demonstrators disrupted highway and subway traffic to the New York World's Fair, passed out leaflets at a public school in protest against lack of integration, and staged a "sit-down" at City Hall protesting the same subject. The Defendants removed their cases to the respective federal district courts having territorial jurisdiction, and the federal district courts promptly remanded the cases to the New York Courts *without evidentiary hearings*. (342 F. 2d at 258).

Before the Second Circuit Court of Appeals, the Appellants abandoned any reliance upon the "denial" clause of Section 1443 and relied entirely upon the second, or "color of authority" clause. In a most thorough, exhaustive, and scholarly analysis of the entire history of Section 1443, Judge Friendly in the majority opinion pretermitted the contention of the State of New York that Section 1443 (2), the "color of authority" clause, is lim-

ited to officers and persons assisting them or acting in some way on behalf of government. But moving beyond that contention, Judge Friendly held that the cases were not removable from state to federal district courts under the "color of authority" clause, stating in part:

> " . . . We begin by returning to the text we must construe. We have agreed with appellants that Sec. 1443 (2) affords a ground for removal separate from Sec. 1443 (1), and we are henceforth assuming, arguendo, that Sec. 1443 (2) is not limited to officers or persons acting at their instance or on their behalf. . . . "
>
> " . . . The officer granted removal under Sec. 3 of the Civil Rights Act of 1866 and its predecessor, Sec. 5 of the Habeas Corpus Act of 1863, would not have been relying on a general constitutional guarantee, but on a specific statutory order telling him to act . . . A private person claiming the benefit of Sec. 1443 (2) can stand no better; he must point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him." (342 F. 2d at 264).
>
> * * * * *
>
> "(4). When the removal statute speaks of 'color of authority,' derived from 'a law providing for equal rights,' it refers to a situation where the lawmakers manifested an affirmative intention that a beneficiary of such law should be able to do something, and not merely to one where he may have a valid defense or be entitled to have civil or criminal liabilities imposed on those interfering with him.
>
> "(5). When the removal statute speaks of 'any law providing for equal rights,' it refers to those laws that are couched in terms of equality, such as the

> historic and the recent civil rights statutes, as distinguished from laws, of which the due process clause and 42 U.S.C. 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them on all." (342 F. 2d at 271).

Thus, the Second Circuit has held, in *Galamison*, supra, and this Honorable Court has denied certiorari on the issue, that the "color of authority" clause does not authorize removal of State prosecutions to federal district courts, although the removing defendants were attempting to justify their acts of protest and resistance under color of authority of the guarantees of free speech and petition embodied in the First Amendment and applied to the States through the due process clause of the Fourteenth Amendment, the equal protection clause of the latter Amendment, and statutory protection of rights conferred by the Constitution.

It may be argued with some surface plausibility by counsel for the Defendants that the majority opinion of the Second Circuit in *Galamison, supra,* is not really damaging to their position in the instant case. They may argue, first, that *Galamison* is not in point factually with this case because here the Defendants were attempting to exercise their equal rights to public accommodations as subsequently spelled out in the Civil Rights Act of 1964, whereas in *Galamison* the Defendants were attempting to exercise their rights of peaceable assembly and freedom of speech protected by the First Amendment, and the due process clause of the Fourteenth Amendment. Secondly, the Defendants herein may argue that, if the instant cases are not removable under the "color of authority" clause, they may still be removable under the first Paragraph of Section 1443, or the "denial" clause.

These arguments, if made by the *Rachel, et al* De-

fendants, must surely fail under the majority opinion of *Galamison,* which states, in part:

> "(14) It should be made clear that the obstacles we perceive to applying Sec. 1443 (2) to removal by civil rights demonstrators would not be at all present in cases where an appropriate showing was made for the invocation of Sec. 1443 (1). An allegation that *Negroes engaged in civil rights demonstrations were being punished in the state courts whereas white persons engaging in similar demonstrations were not,* cf Cox v. Louisiana, *supra,* (379 U. S. 536 — citation supplied), *or that Negro demonstrators were required to post high bail whereas whites were not,* would constitute clear instances of denial to 'any person' of the right provided by 42 U.S.C. 1981, that 'all shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to none other'." (342 F. 2d at 271 — emphasis supplied.)

Looking at the allegations of the *Rachel, et al* removal petition in the light of the italicized words of the *Galamison* opinion setting out examples of when factual allegations pursuant to Section 1443 (1) would allege adequate grounds of "denial" to justify removal, we find no such allegations of discriminatory treatment of Negroes and white persons. In fact, the exact converse appears from the allegations of the *Rachel* removal petition, as follows:

> "Members of the so-called white or Caucasian race are similarly treated and discriminated against when accompanied (to places of public accommodation and convenience) by members of the Negro race. (R. 1, 2. Explanatory words added.)

Nowhere in the removal petition for *Rachel, et al* is there a single allegation of discrimination between

Negro and white civil rights demonstrators, either as to punishment, bond setting, or anything else. Thus the *Rachel* removal petition utterly fails to meet this standard of "denial and inability to enforce rights" laid down by *Galamison*.

Further, the Second Circuit Court of Appeals in *Galamison, supra,* reiterates the exact contention that has been relied upon by counsel for Petitioner throughout the long and tedious course of this litigation in the federal courts, namely, that *Virginia* v. *Rives, Neal* v. *Delaware,* and *Kentucky* v. *Powers,* all *supra,* are still controlling and pose an absolute bar to removal of these cases under the allegations of the *Rachel, et al* removal petition. The Second Circuit majority states that what is now Section 1443 (1) "was largely deprived of effect by the decisions in (citing *Rives, Neal* and *Powers, supra,*) *"Which limited its application to denial by state laws as distinguished from state practice."* (352 F. 2d at 271. Emphasis added.) The Second Circuit goes on to predict that Congress may re-examine these restrictive decisions, "not, of course, by restricting the statute, as the dissent suggests, but by removing the restriction that had been judicially imposed on the first clause and by clarifying the scope of the second." (342 F. 2d at 271-272).

Our point is firmly this: Congress has not yet removed the judicial restriction imposed by prior decisions of this Honorable Court on removal of this type of case under the "denial" clause, and has not yet clarified the scope of such attempted removal under the "color of authority" clause. This being the case, these criminal prosecutions are not removable under either Section 1443, Paragraph (1) or Paragraph (2). Until such time as Congress takes such action, if indeed it ever will, cases

such as the instant one are not removable from State to United States District Courts at the trial level.

In one final comment on *Galamison, supra,* which counsel for Petitioner feel is most strongly in favor of our position, we must nevertheless confess a certain puzzlement in the fine distinction drawn in the majority opinion construing the "under any law providing for equal rights" clause of Section 1443 (2) between laws which are "couched in terms of equality" as distinguished from laws, of which the "due process" clause is one example, that "confer equal rights in the sense . . . of bestowing them upon all." This seems to be semantic hair-splitting. It implies apparently that some cases *might* be removable when the alleged right being exercised by the defendants which resulted in their prosecution was created by a civil rights act of Congress, for example, whereas other cases *might not* be removable when the alleged right being exercised by defendants is vested in them by the Constitution or Amendments thereto. We see no compelling reason for such a distinction. Can it be said that an Act of Congress creating or defining rights in some specific area is in some way superior to a Constitutional provision bestowing rights in other specific areas? If one is to be given superior weight over the other, should not the right conferred by the Constitution or an Amendment thereto which requires ratification by the States prevail over one conferred merely by a statutory act of Congress?

We move on more briefly to other recent cases. Since two of these cases are now pending in this Honorable Court on Petitions for Writ of Certiorari, and since we do not wish to improperly prejudice any of the parties to said actions, we will not engage in extended discussion

of the reasoning of the respective courts in said cases, except to point out important distinctions between those cases and the instant one.

In *City of Chester* v. *Anderson,* 3 Cir. 1965, 347 F. 2d 823; Pet. for Cert. filed, No. 443, the Third Circuit Court of Appeals by an eventual margin of 4 to 3 (on petition for rehearing) affirmed the district court's remand of removed State Court prosecutions. In this case the appellants relied upon the second, or "color of authority" clause of Section 1443, asserting First Amendment rights protecting freedom of speech. The majority of the Third Circuit, relying upon *Galamison,* supra, held that the cases were not removable under 28 U. S. C. 1443 (2). Both the majority and the dissent cited the *Rachel* opinion in the Fifth Circuit which this Court is now reviewing. This is still another Court of Appeals decision holding that remand was not authorized under the "color of authority" clause of 28 U. S. C. 1443. The State of Georgia, Petitioner, relies upon this case, as it applies to Paragraph (2) of said statute.

The Fifth Circuit Court of Appeals, relying almost entirely upon its opinion in the instant case, reversed an order of remand entered by the district court in *Peacock et al.* v. *City of Greenwood,* 5 Cir. 1965, 347 F. 2d 679; Pet. for Cert. filed, No. 471; and remanded the criminal prosecutions to the United States District Court for a hearing, with directions. The State Court prosecutions were for violation of a Mississippi statute making it unlawful to wilfully obstruct any public street. It was alleged in their removal petition that appellants were members of civil rights groups and at the time of their arrests they were engaged in a voter registration drive assisting Negroes to register and secure the right to vote,

as guaranteed by the Federal Constitution and by 42 U. S. C. 1971, the Civil Rights Act of 1960. It was further alleged that the Mississippi statute in question was vague, indefinite, and unconstitutional, both on its face and as applied to them, and that trial under it would contravene their First and Fourteenth Amendment rights. (347 F. 2d at 680-681.)

The Fifth Circuit Court of Appeals held that the cases were *not removable* under Section 1443 (2), the "color of authority" clause, just as the Second Circuit held in *Galamison, supra,* and as the Third Circuit held in *Chester, supra.* In this regard, the Fifth Circuit went a long step further than either the Second and Third Circuits, and decided the question pretermitted in *Galamison* and not mentioned in *Chester,* i.e. "Is removal under the 'color of authority' or second Paragraph of Section 1443 not available unless the act for which the state prosecution is brought was done in at least a quasi-official capacity derived from a law providing for equal rights?" The Fifth Circuit firmly answered this question in the affirmative, saying by a unanimous three-Judge Court at page 686:

> *"Thus we feel that the original language and context of Section 1443 (2) compel the conclusion that that section is limited to federal officers and those assisting them or otherwise acting in an official or quasi-official capacity.* This conclusion is buttressed by the fact that appellants' construction of paragraph (2) would bring within its sweep virtually all the cases covered by paragraph (1), thereby rendering that paragraph of no purpose and effect. Paragraph (1) requires a denial or the inability to enforce equal right in the state court. If paragraph (2) covers all who act under laws providing for equal rights, as appellants contend, this requirement

> could be avoided simply by invoking removal under the second paragraph. Paragraph (1) is an adequate vehicle for the protection and vindication of the rights of appellants, and *we find no warrant for giving paragraph (2) the strained and expansive construction here urged.*" (Emphasis supplied.)

Counsel for Petitioner feel justified in urging this Court that Section 1443 (2), the "color of authority" clause, can be eliminated as an adequate vehicle for removal in the instant case, in view of the foregoing decisions of three Circuit Courts of Appeal, with none *contra* to our knowledge.

We will not discuss the further decision of the Fifth Circuit in *Peacock*, supra, with which we firmly and respectfully disagree, that the cases *were* removable under the "denial" or first clause of Section 1443, except to note that the rationale of the unanimous Court is based almost entirely upon the *Rachel, et al.* case which is now being reviewed.

We do wish to point out some important factual differences between *Peacock*, supra, and the instant case. In *Peacock* the removal petition alleged that the Mississippi statute was *both unconstitutional on its face and as applied*. The removal petition in *Rachel makes neither allegation* as to the Georgia trespass statute. There is *no hint* in the Petition for Removal of *Rachel, et al.* that Georgia Code Section 26-3005 *is unconstitutional on its face*, and only by a very far-fetched and strained construction of the removal petition can one reach the conclusion that it contains a claim that said Georgia Code Section is *being unconstitutionally applied.*

In the *Peacock* case, supra, the Fifth Circuit Court of Appeals cited with approval the opinion of District

Judge Clayton in *City of Clarksdale, Miss.* v. *Gertge*, N.D. Miss. 1964, 237 F. Supp. 213, in which Judge Clayton likewise held that the second, or "color of authority" clause of Section 1443 does not authorize removal unless the act for which the state prosecution was brought was done in at least a quasi-official capacity derived from a law providing for equal rights. Judge Clayton went much further, however, and also held that removal of the state prosecutions arising from racial incidents was not justified under the "denial" clause of Section 1443. He *did not hold a hearing* but *rendered his opinion on briefs directed to the face of the pleadings*, i.e., the removal petition, which was far more detailed as to alleged denial of federally protected rights in Mississippi than is the skimpy, conclusionary removal petition in the instant case.

For the foregoing reasons, Counsel for Petitioner most respectfully insist that the divided majority of the Fifth Circuit Court of Appeals erred in reversing the remand order of the District Court in this case. We insist that our motion to dismiss the appeal should have been granted because the notice of appeal was not timely filed, and we do not waive that ground. But if this Court decides the timeliness of the appeal adversely to us, and reaches the merits of this case, the removal petition still does not allege sufficient grounds to justify removal.

(b) The removal petition must stand or fall upon its allegations alone, and there is no requirement for the District Court to hold an evidentiary hearing.

The Court of Appeals held that the district court should have held a hearing, to allow the Defendants

to prove their allegations and remanded the case to the District Court for such a hearing. Petitioner maintains that this was error. We find little legal precedent for such action. Removal petitions are considered on their face, by the factual allegations, in virtually every jurisdiction except the Fifth Circuit.

In *Maryland* v. *Soper, Judge* (No. 1) 1925, 270 U. S. 9, the Supreme Court said:

> "We think the *averments of the amended petition* in this case are not sufficiently informing and specific to make a case for removal under Sec. 33." (at page 34)
>
> . . . . . .
>
> "*These averments* amount to little more than to say that the homicide on account of which they are charged with murder was at a time when they were engaged in performing their official duty . . . (at page 35) . . . . . .
>
> ". . . . But they (the removing defendants) should do more than this in order to satisfy the statute (Section 33, Judicial Code, formerly Section 643, Revised Statutes). In order to justify so exceptional a procedure (removal of criminal cases to federal court), the person seeking the benefit of it should be candid, specific, and positive in explaining his relation to the transaction growing out of which he has been indicted, and in showing that his relation to it was confined to his acts as an officer. As the defendants *in their statement* have not clearly fulfilled this requirement, *we must grant the writ of mandamus directing the District Judge to remand the indictment and prosecution.* Should the District Judge deem it proper *to allow another amendment to the petition for removal,* by which the *averments necessary* to bring the case within Sec. 33 are supplied, he will be at liberty to do so. Otherwise the

> prosecution is to be remanded as upon a peremptory writ." (Italics and explanatory words in parenthesis added.)

Petitioner thus maintains that the removability of a case depends on the allegations of the removal petition itself. For example, in *Birmingham* v. *Croskey*, D.C. N.D. Ala., 1963, 217 F. Supp. 947, the Courts' opinion does not mention *any* evidentiary hearing, and reads in brief portions as follows (217 F. Supp. 950-51):

> "As will become readily apparent, the foregoing *allegations* (of the removal petition) are insufficient to justify the removal of the case to this Court" (at page 950) and "Considered in the light of the aforementioned authority, the *petition for removal* to this Court *does not allege* facts sufficient to justify the removal that has been granted" (at the bottom of page 950 and top of page 951).

In other cases where remand was ordered, the following excerpts illustrate our point:

> "The *petition* is probably insufficient also for the reasons, etc." (*North Carolina* v. *Jackson*, supra at page 683); "Otherwise stated, even if the *material factual allegations of the petition* are accepted at face value, the Court is not convinced, etc." (*Arkansas* v. *Howard*, supra, at page 633.)

Petitioner could quote similar language from many other cases, showing that the allegations of the removal petitions are the only matters considered by federal district courts, and that evidentiary hearings are not required or even indicated, but we feel it is unnecessary.

See also: *City of Clarksdale* v. *Gertge*, and *People of the State of New York* v. *Galamison*, both *supra*, wherein the District Courts remanded cases without a hearing and based on the pleadings in the removal petitions.

If District Courts are required to hold prolonged and detailed hearings every time an inadequate removal petition is filed, the work load of such Courts will be greatly increased. Such petitions should be, and have been in the past, considered strictly in the light of the facts alleged therein. Therefore, the District Court properly remanded the case without a hearing.

III. ASSUMING ARGUENDO THAT REMAND TO THE DISTRICT COURT FOR AN EVIDENTIARY HEARING WAS PROPER, THE DIRECTIONS GIVEN THE LOWER COURT WERE CLEARLY ERRONEOUS.

The majority of the Court of Appeals directed the lower court to dismiss the prosecutions, if upon the hearing it appeared that racial reasons were the cause of Defendants' removal from the various restaurants. No discretion whatever was left to the District Court by these directions, except to make a finding of fact as to that one issue.

(a) The aforesaid directions to the lower Court unduly limited the judicial discretion of that Court in applying the evidence to the doctrine of Hamm v. City of Rock Hill.

As Circuit Judge Bell points out (R. 34), such a holding is tantamount to applying *Hamm* in all its sweep against trespass statutes, retroactively to the State of Georgia, and is in effect a holding that Georgia has applied and will continue to apply its trespass statute contrary to the teachings of this Honorable Court in *Hamm*, even though *Hamm* had not been decided when the cases were in the State Courts, and even though those

State Courts have not had an opportunity to deal with these cases in the light of *Hamm*.

This holding assumes that *any* trespass prosecution growing out of racial causes is automatically abated by *Hamm*. *Hamm* does not hold this. It is strictly limited to peaceful and non-violent attempts to exercise a right to be served in places of public accommodation, without regard to race, color or creed. A number of recent Supreme Court decisions have also stressed the peaceful and non-violent actions of defendants prosecuted in various types of "sit-in" demonstrations. These cases are *Thompson* v. *City of Louisville*, 1962, 362 U. S. 199; *Shuttlesworth* v. *City of Birmingham, Ala.*, 1963, 373 U. S. 262; *Peterson* v. *City of Greenville, S. C.*, 1963, 373 U. S. 244; and *Griffin* v. *Maryland*, 1964, 378 U. S. 130. If the evidence should show violence or vandalism on the part of Defendants, *Hamm* would not be applicable.

Another issue which might arise from the evidence in a hearing is whether or not any one of the restaurants involved is in fact a place of public accommodation within the meaning of the Civil Rights Act of 1964. The District Court should be allowed to determine these matters upon the evidence, and not be restricted to one issue as he is at present under the majority decision of the Court of Appeals.

(b) The District Court's remand order should have been affirmed, and the criminal prosecutions returned to Fulton Superior Court, thus allowing the Courts of Georgia to consider the cases in the light of the Hamm decision.

Counsel for Petitioner respectfully submit that the Court of Appeals has gone one step further than this Honorable Court has ever done, in returning the cases to the District Court with directions to dismiss same if one specific finding, i.e., racial causes for the arrests of Defendants, is made. This wrests jurisdiction of the cases from the Georgia Courts without giving them a chance to apply the latest ruling of this Honorable Court. And there is not a single allegation in the Petition for Removal which indicates that the Defendants will not be treated completely fairly in the Georgia Courts, in the light of *Hamm*. Counsel for Petitioner agree with Circuit Judge Bell's opinion that Defendants should be required to show that Georgia Courts will not apply *Hamm* fairly to them. If they fail to do this, the cases should be remanded to the State courts.

Counsel for the Defendants might conceivably argue in their Brief that the vitality of Circuit Court Judge Bell's partially dissenting opinion in this case as to the course which he feels should be taken by the District Court upon a hearing, upon which Petitioner relies heavily, has been sapped by Judge Bell's more recent opinion in *Peacock*, supra, in which he said in part, in a footnote, while writing the opinion of the Court:

> "6. Proof of the allegations in this case would establish removal jurisdiction and *ipso facto* entitle appellants to dismissal of their prosecutions by the District Court. Failure of proof would require remand to the state court for trial. (347 F. 2d at 684)

Such an argument, if made, would ignore the vital fact that the Supreme Court of Georgia in *Bolton* v. *State*, 1965, 220 Ga. 632, 140 S.E. 2d 866, applied the doctrine of *Hamm* and abated several State Court tres-

pass convictions. Apparently there has been no such recognition of the controlling effect of *Hamm* by the highest appellate court of the State of Mississippi — at any rate, no such opinion is cited in *Peacock*, supra, and counsel for Petitioner know of no such opinion. This is a very important and indeed crucial distinction between *Peacock* and *Rachel*. Where the highest Court of the State of Georgia has unanimously recognized and followed the majority opinion of this Honorable Court, jurisdiction at the trial level should not be wrested from the Georgia Courts until they have been given an opportunity to consider these cases in the light of *Hamm*, supra, and *Bolton*, supra. Neither of these cases had been decided by the United States Supreme Court or the Supreme Court of Georgia, respectively, when the *Rachel, et al*, defendants removed their cases to the federal district court, and District Judge Boyd Sloan remanded them to Fulton Superior Court.

Any possible conjecture that Georgia Courts will not fairly apply the doctrine of *Hamm* to any and all defendants similarly situated to these Defendants should have been laid to rest in *Bolton*, supra. The Negro defendants in *Bolton* were convicted for violation of the same anti-trespass law involved in the instant case, for sitting down in, and refusing to leave a public eating place in Athens, Georgia, after having been refused service. The Supreme Court of Georgia, in reversing the convictions, said in part, in a unanimous opinion:

> ". . . So applying the rules of Sec. 201 (b) (2), (c) of the Civil Rights Act of 1964 to the facts of this case, we find and hold that this public eating place offers to serve interstate travelers and under the majority holding of the Supreme Court of the United States in *Hamm* v. *City of Rock Hill (South*

Carolina), and *Lupper* v. *State of Arkansas*, 379 U. S. 306 (13 L.E. 2d 300), both of which were decided in one opinion on December 14, 1964, these convictions must be vacated and the prosecutions dismissed, notwithstanding the offense charged against each of these defendants was committed and convictions therefor were obtained prior to the passage of the Civil Rights Act of 1964. In those two cases the majority held that the Civil Rights Act of 1964 forbids discrimination in specified places of public accommodation and removes peaceful attempts to be served on an equal basis from the category of punishable activities. While those majority holdings do not accord with our conception of the meaning and purpose of the provisions of the Constitution of this State and the Constitution of the United States which prohibit the enactment of ex post facto or retroactive laws (Code Sec. 1-128, 2-302), we are, under our oaths, nevertheless required to follow them and we will therefore do so in these cases; and being so required, *we therefore hold that these pending convictions are abated by the 1964 Civil Rights Act* and it is ordered that the sentences imposed on each of these defendants be vacated *and that the charge against each defendant be dismissed.*" (Emphasis supplied)

Counsel for Petitioner most respectfully insist that the Georgia Courts should be afforded an equal opportunity to rule on these cases, unless Defendants can show that their equal rights will be denied them in the Georgia Courts.

CONCLUSION

As previously stated in Petitioner's Summary of Argument, counsel for Petitioner are not concerned with the future outcome of these prosecutions if they are remanded to the State Courts. We are deeply concerned,

however, with the issues of whether the notice of appeal was timely filed, whether these cases are removable to federal district court under the meager allegations of the removal petition, and whether the directions given by the Court of Appeals to the District Court to dismiss the prosecutions upon the finding of one factor only were erroneous.

Counsel for Petitioner therefore respectfully urge this Honorable Court:

(1) To hold that the time limit for filing a notice of appeal of the remand order in the instant case is controlled by Rule 37 (a) (2), Fed. R. Crim. P.; that the appeal thus is not timely; that the Court of Appeals therefore had no jurisdiction to entertain the appeal and should have granted Petitioner's timely motion to dismiss; and to reverse the decision of the Court of Appeals without ruling upon the merits of this case.

(2) In the event this Court rules adversely to Petitioner's first ground and holds that Defendants' appeal is timely, to hold that these State prosecutions are not removable under 28 U.S.C. 1443 (1) (2) based on the allegations in Defendants' Petition for Removal; that an evidentiary hearing by the District Court is not proper or required; that the allegations of the removal petition must be considered on its face, without supplementation by oral evidentiary hearings before the District Court; and to reverse the decision of the Court of Appeals on the merits, thus giving effect to the original Order of Remand entered by the District Court returning these prosecutions to Fulton Superior Court.

(3) In the event this Court rules adversely to Petitioner's first two grounds, and holds that the appeal was

timely, and that the Court of Appeals was correct in returning the case to the District Court for an evidentiary hearing, to hold that the instructions given by the Court of Appeals to the District Court to dismiss the prosecutions if one sole finding of fact is made, i.e., that the removal of the Defendants from the various places of public accommodation was done for racial reasons, were erroneous, and to reverse that portion of the decision of the Court of Appeals. We urge this Court in that event to hold that the District Court, upon such evidentiary hearing, could and should consider any and all factors relevant to the removability of these cases, and that these Defendants should be required to prove in such a hearing that they cannot receive fair trials in Georgia Courts, in view of the *Bolton* decision, supra, by the Georgia Supreme Court, before the District Court would be authorized to retain jurisdiction of the cases, and that should the Defendants fail to prove this, the District Court should remand the cases to Fulton Superior Court.

Therefore, Petitioner insists that the decision of the

Fifth Circuit Court of Appeals should be reversed, in whole or in part.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Georgia, Fulton County

I, J. Robert Sparks, of counsel for the State of Georgia, Petitioner, certify that I have this day served copies of the foregoing Brief for Petitioner and Appendix, upon Defendants by depositing in the United States Post Office in Atlanta, Georgia two copies of same in an envelope addressed to Donald L. Hollowell and Howard Moore, Jr., Esquires, Attorneys at Law, 859½ Hunter Street, N.W., Atlanta, Georgia 30314; two copies of same in an envelope addressed to Jack Greenberg, Esquire, Attorney at Law, 10 Columbus Circle, New York, New York 10019; and two copies of same in an envelope addressed to Professor Anthony G. Amsterdam, Esquire, Attorney at Law, University of Pennsylvania Law School, Philadelphia, Pennsylvania; counsel of record for Defendants, with sufficient first class postage affixed thereto, plus air mail postage for Mr. Greenberg's and Mr. Amsterdam's copies.

This 26th day of November, 1965.

J. Robert Sparks
Assistant Solicitor General
Atlanta Judicial Circuit

APPENDIX "A"

PERTINENT PARTS OF CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT I, CONSTITUTION OF THE UNITED STATES

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

AMENDMENT XIV, CONSTITUTION OF THE UNITED STATES

"Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

ACT OF 1866, SEC. 3 (14 STAT. 27, 28)

"An Act to protect all persons in the United States in their Civil Rights, and furnish the means of their vindication.

"Section 3. And be it further enacted, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offenses committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the

State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever, or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the 'Act relating to habeas corpus and regulating judicial proceedings in certain cases,' approved March 3, eighteen hundred and sixty-three, and all acts amendatory thereof.

ACT OF 1887, SECS. 2 AND 5
(24 STAT. 553, 555)

"Section 2. . . . . Whenever any cause shall be removed from any State court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."

"Section 5. That nothing in this act shall be held, deemed, or construed to repeal or affect any jurisdiction or right mentioned either in sections 641, or in 642, or

in 643, or in 722, or in title 24 of the Revised Statutes of the United States, or mentioned in section 8 of the act of Congress of which this act is an amendment, or in the act of Congress approved March 1, 1875, entitled 'An act to protect all citizens in their civil or legal rights.' "

ACT OF 1875, SEC. 5 (18 STAT. 472)

"Section 5. That if, in any suit commenced in a circuit court or removed from a State court to a circuit court of the United States, it shall appear to the satisfaction of said circuit court, at any time after such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, ... , the said circuit court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed as justice may require, and shall make such order as to costs as shall be just; but the order of said circuit court dismissing or remanding said cause to the State Court shall be reviewable by the Supreme Court on writ of error or appeal, as the case may be."

SECTION 71, FORMER TITLE 28, U. S. C.
(JUDICIAL CODE, SEC. 28)

". . . . Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal from the decision of the district court so remanding such cause shall be allowed. . . . . ."

SECTION 74, FORMER TITLE 28, U. S. C. (JUDICIAL CODE, SEC. 31)

"When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforsesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next district court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided. . . . . ."

SECTION 76, FORMER TITLE 28, U. S. C. (JUDICIAL CODE, SEC. 33)

"When any civil suit or criminal prosecution is commenced in any court of a State against any officer appointed under or acting by authority of any revenue law of the United States, or against any person acting under or by authority of any such officer, on account of any act done under color of his office or of any such law, or on account of any right, title, or authority

claimed by such officer or other person under any such law, ... the said suit or prosecution may at any time before the trial or final hearing thereof be removed for trial into the district court next to be holden in the district where the same is pending upon the petition of such defendant to said district court. . . . . .; and thereupon it shall be the duty of the State court to stay all further proceedings in the cause, and the suit or prosecution, ..."

ACT OF FEBRUARY 24, 1933,
C. 119, 47 STAT. 904

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict in criminal cases in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, in the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, in the United States Court for China, in the United States Circuit Courts of Appeals, and in the Court of Appeals of the District of Columbia.

Sec. 2. The right of appeal shall continue in those cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and of preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

Sec. 3. The Supreme Court may fix the dates when such rules shall take effect and the extent to which they

shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force.

Approved, February 24, 1933.

ACT OF MARCH 8, 1934,
C. 49, 48 STAT. 399

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act of February 24, 1933 (ch. 119), entitled "An Act to give the Supreme Court of the United States authority to prescribe rules of practice and procedure with respect to proceedings in criminal cases after verdict" (U.S.C., title 28, sec. 723a), be, and the same is hereby, amended to read as follows:

"That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the District Courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and Virgin Islands, in the Supreme Courts of the District of Columbia, Hawaii, and Puerto Rico, in the United States Court for China, in the United States Circuit Courts of Appeals, in the Court of Appeals of the District of Columbia, and in the Supreme Court of the United States: *Provided,* That nothing herein contained shall be construed to give the Supreme Court the power to abridge the right of the accused to apply for withdrawal of a plea of guilty, if such application be made within ten days after entry of such plea, and before sentence is imposed.

"Sec. 2. The right of appeal shall continue in those

cases in which appeals are now authorized by law, but the rules made as herein authorized may prescribe the times for and manner of taking appeals and applying for writs of certiorari and preparing records and bills of exceptions and the conditions on which supersedeas or bail may be allowed.

"Sec. 3. The Supreme Court may fix the dates when such rules shall take effect and the extent to which they shall apply to proceedings then pending, and after they become effective all laws in conflict therewith shall be of no further force."

Approved, March 8, 1934.

ACT OF JUNE 29, 1940, C. 445, 54 STAT. 688

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the district courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, in the United States Court for China, and in proceedings before United States commissioners. Such rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session, and thereafter all laws in conflict therewith shall be of no further force and effect.

Approved, June 29, 1940.

ACT OF NOVEMBER 21, 1941, C. 492, 55 STAT. 776

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the Act entitled "An Act to give the Supreme Court of the United States authority to prescribe rules of practice and procedure with respect to proceedings in criminal cases after verdict", approved February 24, 1933 (47 Stat. 904, U. S. C., title 18, sec. 688), as amended, and the provisions of the Act entitled "An Act to give the Supreme Court of the United States authority to prescribe rules of practice, pleading, and procedure with respect to proceedings in criminal cases prior to and including verdict, or finding or plea of guilty", approved June 29, 1940 (54 Stat. 688, U. S. C., title 18, sec. 687), are hereby extended to proceedings to punish for criminal contempt of court.

Approved, November 21, 1941.

ACT OF JUNE 25, 1948, C. 645, 62 STAT. 683, SECTIONS 3731 & 3732

§ 3731. Appeal by United States

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the validity or construction of the statute upon which the indictment or information is founded.

From a decision arresting a judgment of conviction for insufficiency of the indictment or information, where

such decision is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a circuit court of appeals or the United States Court of Appeals for the District of Columbia, as the case may be, in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

From a decision arresting a judgment of conviction except where a direct appeal to the Supreme Court of the United States is provided by this section.

The appeal in all such cases shall be taken within thirty days after the decision or judgment has been rendered and shall be diligently prosecuted.

Pending the prosecution and determination of the appeal in the foregoing instances, the defendant shall be admitted to bail on his own recognizance.

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a circuit court of appeals, or the United States Court of Appeals for the District of Columbia, the Supreme Court of the United States shall remand the case to the circuit court of appeals or the United States Court of Appeals for the District of Columbia, as the case may be, which shall then have jurisdiction to hear and determine the same

as if the appeal had been taken to that court in the first instance.

If an appeal shall be taken pursuant to this section to any circuit court of appeals or to the United States Court of Appeals for the District of Columbia, which, in the opinion of such court, should have been taken directly to the Supreme Court of the United States, such court shall certify the case to the Supreme Court of the United States, which shall thereupon have jurisdiction to hear and determine the case to the same extent as if an appeal had been taken directly to that Court.

§ 3732. Taking of Appeal; Notice; Time—(Rule)

SEE FEDERAL RULES OF CRIMINAL PROCEDURE

Taking appeal; notice, contents, signing; time, Rule 37 (a).

SECTION 1443, TITLE 28, U. S. C.

"Section 1443. Civil rights cases

"Any of the following civil actions or criminal prosecutions, commmenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law. (June 25, 1948, c. 646, 62 Stat. 938.)"

SECTION 1446 (a), (c), (d), TITLE 28, U. S. C.

"Section 1446. Procedure for removal

"(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

". . . . . .

"(c) The petition for removal of a criminal prosecution may be filed at any time before trial.

"(d) Each petition for removal of a civil action or proceeding, except a petition in behalf of the United States, shall be accompanied by a bond with good and sufficient surety conditioned that the defendant or defendants will pay all costs and disbursements incurred by reason of the removal proceedings should it be determined that the case was not removable or was improperly removed."

SECTION 1447 (c), (d), TITLE 28, U. S. C.

"Section 1447. Procedure after removal generally

". . . . . .

"(c) If at any time before final judgment it appears that the case was removed improvidently and without jurisdiction, the district court shall remand the case, and may order the payment of just costs. A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State court may thereupon proceed with such case.

"(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise. (June 25, 1948, c. 646, 62 Stat. 939, amended May 24, 1949, c. 139, Section 84, 63 Stat. 102.)"

SECTION 2107, TITLE 28, U. S. C.

"Section 2107. Time for Appeal to Court of Appeals.

"Except as otherwise provided in this section, no appeal shall bring any judgment, order, or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed within thirty days after the entry of such judgment, order or decree.

"In any such action, suit or proceeding in which the United States or an officer or agency thereof is a party, the time as to all parties shall be sixty days from such entry . . . . . "

CIVIL RIGHTS ACT OF 1964, 78 STAT. 241
(Pp. 289-291)

§201:

"(b) Each of the following establishments which serves the public is a place of public accommodation within the meaning of this title if its operations affect commerce . . .

* * * * * * * *

"(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment . . .

"(c) The operations of an establishment affect com-

merce within the meaning of this title if . . . it serves or offers to serve interstate travelers . . ."

§203:

"No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any person of any right or privilege secured by section 201 or 202, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten, or coerce any person with the purpose of interfering with any right or privilege secured by section 201 or 202, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202."

SECTION 1404, TITLE 18 U. S. C.

Section 1404, Motion to Suppress — Appeal by the United States

In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion for the return of seized property and to suppress evidence made before the trial of a person charged with a violation of —

(1) any provision of part I or part II of subchapter A of chapter 39 of the Internal Revenue Code of 1954 the penalty for which is provided in subsection (a) or (b) of section 7237 of such Code,

(2) subsection (c), (h), or (i) of section 2 of the Narcotic Drugs Import and Export Act, as amended (21 U. S. C., sec. 174), or

(3) The Act of July 11, 1941, as amended (21 U. S. C., sec. 184a).

This section shall not apply with respect to any such

motion unless the United States attorney shall certify, to the judge granting such motion, that the appeal is not taken for purposes of delay. Any appeal under this section shall be taken within 30 days after the date the order was entered and shall be diligently prosecuted. Added July 18, 1956, c. 629, Title II, Sec. 201, 70 Stat. 573.

SECTION 1981, TITLE 42 U. S. C.

"Section 1981. Equal Rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce tracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

REVISED STATUTES, TITLE XIII,
THE JUDICIARY, SEC. 641

"When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid; or for refusing to do any act on the ground that it would be inconsistent with such law, such suit

or prosecution, may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed for trial into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceeding in the State courts shall cease, and shall not be resumed except as hereinafter provided. . . . . But if, without such refusal or neglect of said clerk to furnish such copies and proof thereof, the petitioner for removal fails to file copies in the circuit court as herein provided, a certificate, under the seal of the circuit court, stating such failure, shall be given, and upon the production thereof in said State court, the cause shall proceed therein as if no petition for a removal had been filed." (Note: No mention made here of remand orders, except upon failure to file copies of proceedings in circuit court, or of the right to appeal a remand order.)

RULE 37 (a) (2), TITLE 18, U. S. C.

"Rule 37. Taking Appeal; and Petition for Writ of Certiorari

"(a) . . . . . .

"(1) . . . . . .

"(2) Time for Taking Appeal. An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. . . . . ."

RULE 45 (a), TITLE 18, U. S. C.

"Rule 45. Time

"(a) Computation. In computing any period of time the day of the act or event after which the designated period of time begins to run is not to be included. The last day of the period so computed is to be included, unless it is a Sunday or legal holiday, in which event the period runs until the end of the next day which is neither a Sunday nor a holiday. When a period of time prescribed or allowed is less than 7 days, intermediate Sundays and holidays shall be excluded in the computation. A half holiday shall be considered as other days and not as a holiday."

RULE 54 (b) (1), TITLE 18, U. S. C.

Rule 54. Application and Exceptions

"(b) Proceedings.

"(1) Removed Proceedings. These rules apply to criminal prosecutions removed to the United States district courts from state courts and govern all procedure after removal, except that dismissal by the attorney for the prosecution shall be governed by state law."

RULE 59, TITLE 18, U. S. C.

Rule 59. Effective Date.

These rules take effect on the day which is 3 months subsequent to the adjournment of the first regular session of the 79th Congress, but if that day is prior to September 1, 1945, then they take effect on September 1, 1945. They govern all criminal proceedings thereafter commenced and so far as just and practicable all proceedings then pending.

RULE 73 (a), TITLE 28, U. S. C.

"Rule 73. Appeal to a Court of Appeals

"(a) When and How Taken. When an appeal is permitted by law from a district court to a court of appeals the time within which such an appeal may be taken shall be 30 days from the entry of the judgment appealed from unless a shorter time is provided by law, except that in any action in which the United States or an officer or agency thereof is a party the time as to all parties shall be 60 days from such entry, ..."

GEORGIA CODE ANNOTATED, 26-3005

"26-3005. Refusal to leave premises of another when ordered to do so by owner or person in charge. — It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor. (Acts 1960, p. 142.)"

RULE III, RULES OF PRACTICE AND PROCEDURE AFTER PLEA OF GUILTY, ETC. 292 U. S. 662

"III. *Appeals*. An appeal shall be taken within five (5) days after entry of judgment of conviction, except that where a motion for a new trial has been made within the time specified in subdivision (2) of Rule II, the appeal may be taken within five (5) days after entry of the order denying the motion . . . . ."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 147

GEORGIA,

Petitioner,

—v.—

THOMAS RACHEL, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

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INDEX

	PAGE
Opinions Below	1
Jurisdiction	1
Constitutional Provisions, Statutes and Rules Involved	2
Questions Presented	9
Statement of the Case	10
Summary of Argument	13
Argument	17
I. The Court of Appeals Did Not Lack Jurisdiction of the Appeal by Reason of Asserted Untimeliness in Filing the Notice of Appeal	17
A. As Rule 37(a)(2) Has No Application to Pre-Verdict Appeals, the Notice of Appeal Was Timely Filed	18
B. The Court of Appeals Had Jurisdiction to Review the Remand Order by Proceedings in the Nature of Mandamus, as to Which No Time Is Limited by Rule	27
1. The Remand Order Is Reviewable by Mandamus	27
2. The Court of Appeals Might Permissibly Entertain the Present Proceeding as on Petition for Mandamus	32

PAGE

C. This Court May Review the Remand Order as on Original Petition for Mandamus 34

II. Defendants Criminally Prosecuted for Conduct Protected by Title II of the Civil Rights Act of 1964 May Remove Their Prosecutions Under 28 U. S. C. § 1443 Without Showing That the State Criminal Statutes Underlying Their Prosecutions Are Facially Unconstitutional or the State Courts Unfair 35

A. The Background of 28 U. S. C. § 1443 36

1. Legislative Background 36

2. Judicial Background 73

B. The Construction of 28 U. S. C. § 1443 87

1. The Court of Appeals Correctly Held That Persons Prosecuted for Exercising Their Right to Equal Public Accommodations Under the Civil Rights Act of 1964 Are Thereby Denied and Unable to Enforce Those Rights, Within the Meaning of § 1443(1), Notwithstanding the Statutes Underlying the Prosecutions Are Not Unconstitutional on Their Face and the State Courts Are Not Alleged to Be Unfair 90

2. Persons Prosecuted for Exercising Their Right to Equal Public Accommodations Under the Civil Rights Act of 1964 Are Thereby Prosecuted for

PAGE

an Act Under Color of Authority Derived from the Civil Rights Act, Within the Meaning of § 1443(2) 104

III. Defendants' Removal Petition Was Not Deficient as a Pleading 114

IV. The Court of Appeals' Directions Governing Hearing on Remand Were Proper 118

Conclusion 119

Appendix

Motion for Stay Pending Appeal 1a

Order and Judgment on Remitter 4a

TABLE OF CASES

Alabama v. Boynton, S. D. Ala., C. A. No. 3560-65, April 16, 1965 ..... 26, 87

Anderson v. Elliott, 101 Fed. 609 (4th Cir. 1900), dism'd, 22 S. Ct. 930 (1902) 41

Arkansas v. Howard, 218 F. Supp. 626 (E. D. Ark. 1963) 86

Arnold v. North Carolina, 376 U. S. 773 (1964) 75

The Astorian, 57 F. 2d 85 (9th Cir. 1932) 33

Babbitt v. Clark, 103 U. S. 606 (1880) 30

Baggett v. Bullitt, 377 U. S. 360 (1964) 98, 112

Bankers Life & Cas. Co. v. Holland, 346 U. S. 379 (1953) 31

Bantam Books, Inc. v. Sullivan, 372 U. S. 58 (1963) .. 98

PAGE

Birsch v. Tumbleson, 31 F. 2d 811 (4th Cir. 1929) 41
Blyew v. United States, 80 U. S. (13 Wall.) 581 (1871) 65
Bowles v. Strickland, 151 F. 2d 419 (5th Cir. 1945) 25
Brazier v. Cherry, 293 F. 2d 401 (5th Cir. 1961) 71
Brown v. Cain, 56 F. Supp. 56 (E. D. Pa. 1944) 41, 42
Bruner v. United States, 343 U. S. 112 (1952) 24
Bush v. Kentucky, 107 U. S. 110 (1883) 80, 82

California v. Chue Fan, 42 Fed. 865 (C. C. N. D. Cal. 1890) 86
California v. Lamson, 12 F. Supp. 813 (N. D. Cal. 1935), petition for leave to appeal denied, 80 F. 2d 388 (Wilbur, Circuit Judge, 1935) 86
Carter v. Campbell, 285 F. 2d 68 (5th Cir. 1960) 33
Castle v. Lewis, 254 Fed. 917 (8th Cir. 1918) 41
City of Birmingham v. Croskey, 217 F. Supp. 947 (N. D. Ala. 1963) 86
City of Chester v. Anderson, 347 F. 2d 823 (3d Cir. 1965) 89
City of Clarksdale v. Gertge, 237 F. Supp. 213 (N. D. Miss. 1964) 85
Cobbledick v. United States, 309 U. S. 323 (1940) 24
Cohens v. Virginia, 19 U. S. (6 Wheat.) 264 (1821) .. 39
Colorado v. Symes, 286 U. S. 510 (1932) 117
Cooper v. Alabama, 5th Cir., No. 22424, December 6, 1965 87
Coppedge v. United States, 369 U. S. 438 (1962) 32
Cox v. Louisiana, 348 F. 2d 750 (5th Cir. 1965) 86
Cramp v. Board of Public Instruction, 368 U. S. 278 (1961) 97
Crump v. Hill, 104 F. 2d 36 (5th Cir. 1939) 32
Cutting v. Bullerdick, 178 F. 2d 774 (9th Cir. 1949) .. 34

PAGE

Des Isles v. Evans, 225 F. 2d 235 (5th Cir. 1955) 33
DiBella v. United States, 369 U. S. 121 (1962) 24
Dickey v. United States, 332 F. 2d 773 (9th Cir. 1964) 33
Dilworth v. Riner, 343 F. 2d 226 (5th Cir. 1965) 96
Dombrowski v. Pfister, 380 U. S. 479 (1965) 98, 112

Edwards v. South Carolina, 372 U. S. 229 (1963) 97
Employers Reinsurance Corp. v. Bryant, 299 U. S. 374 (1937) 30
England v. Louisiana State Board of Medical Examiners, 375 U. S. 411 (1964) 92, 111
Eubanks v. Louisiana, 356 U. S. 584 (1958) 75
Ex parte Collett, 337 U. S. 55 (1949) 25
Ex parte Fahey, 332 U. S. 258 (1947) 30
Ex parte McCardle, 73 U. S. (6 Wall.) 318 (1868) .. 54
Ex parte Newman, 81 U. S. (14 Wall.) 152 (1871) .. 30
Ex parte Peru, 318 U. S. 578 (1943) 2, 34
Ex parte Tilden, 218 Fed. 920 (D. Ida. 1914) 41
Ex parte United States, 287 U. S. 241 (1932) 35
Ex parte United States ex rel. Anderson, 67 F. Supp. 374 (S. D. Fla. 1946) 42
Ex parte Warner, 21 F. 2d 542 (N. D. Okla. 1927) 41
Ex parte Wells, 29 Fed. Cas. 633 (No. 17368) (1878) 86

Farmer v. State, 161 So. 2d 159 (1964) 97
Fay v. Noia, 372 U. S. 391 (1963) 54, 91
Feiner v. New York, 340 U. S. 315 (1951) 112
Fields v. South Carolina, 375 U. S. 44 (1963) 97
Foman v. Davis, 371 U. S. 178 (1962) 33
Freedman v. Maryland, 380 U. S. 51 (1965) 112

PAGE

Galloway v. City of Columbus, 5th Cir., No. 22935, November 24, 1965 87
Gay v. Ruff, 292 U. S. 25 (1934) 30
Gibson v. Mississippi, 162 U. S. 565 (1896) 79, 80, 81, 102
Georgia v. Tuttle, 377 U. S. 987 (1964) 12, 28, 32
Georgia Hardwood Lumber Co. v. Compania de Navegacion Transmar, S.A., 323 U. S. 334 (1945) 32

Hadjipateras v. Pacifica, S.A., 290 F. 2d 697 (5th Cir. 1961) 33
Hamm v. City of Rock Hill, 379 U. S. 306 (1964) ..12, 13, 36, 88, 103, 116, 118
Heflin v. United States, 358 U. S. 415 (1959) 23, 34
Henry v. City of Rock Hill, 376 U. S. 776 (1964) 97
Hernandez v. Texas, 347 U. S. 475 (1954) 75
Hill v. Pennsylvania, 183 F. Supp. 126 (W. D. Pa. 1960) 86
Hoadley v. San Francisco, 94 U. S. 4 (1876) 25, 30
Hughley v. City of Opelika, M. D. Ala., Cr. No. 2319E, November 19, 1965 87
Hull v. Jackson County Circuit Court, 138 F. 2d 820 (6th Cir. 1943) 85
Hulson v. Atchison, Topeka & Santa Fe Ry. Co., 289 F. 2d 726 (7th Cir. 1961) 33

In re Fair, 100 Fed. 149 (C. C. D. Neb. 1900) 41
In re Hohorst, 150 U. S. 653 (1893) 32
In re Kaminetsky, 234 F. Supp. 991 (E. D. N. Y. 1964) 85
In re Leigh, 139 F. 2d 386 (D. C. Cir. 1943) 33
In re Matthews, 122 Fed. 248 (E. D. Ky. 1902) 42
In re Miller, 42 Fed. 307 (E. D. S. C. 1890) 42

PAGE

In re Neagle, 135 U. S. 1 (1890) 41, 43, 54
In re Pennsylvania Co., 137 U. S. 451 (1890) 30
In re Wright, M. D. Ala., Cr. No. 11739N, August 3, 1965 87
Insurance Co. v. Comstock, 85 U. S. (16 Wall.) 258 (1872) 30

Kentucky v. Powers, 201 U. S. 1 (1906) 60, 61, 82, 84, 85, 86, 89, 90, 92, 93, 95, 96, 98, 99, 100, 101, 102
Knight v. State, 161 So. 2d 521 (1964) 97

La Buy v. Howes Leather Co., 352 U. S. 249 (1957) 29
Lefton v. City of Hattiesburg, 333 F. 2d 280 (5th Cir. 1964) 71
Lima v. Lawler, 63 F. Supp. 446 (E. D. Va. 1945) 41, 42
Local No. 438 v. Curry, 371 U. S. 542 (1963) 28
Lott v. United States, 367 U. S. 421 (1961) 23, 25
Louisiana v. Murphy, 173 F. Supp. 782 (W. D. La. 1959) 86

Maryland v. Kurek, 233 F. Supp. 431 (D. Md. 1964) 85
Maryland v. Soper (No. 1), 270 U. S. 9 (1926) 89, 116, 117
McClellan v. Carland, 217 U. S. 268 (1910) 29
McMeans v. Mayor's Court of Fort Deposit, M. D. Ala., Cr. No. 11759N, September 30, 1965 87
McNair v. City of Drew, 351 F. 2d 498 (5th Cir. 1965) 86
McNeese v. Board of Education, 373 U. S. 668 (1963) 67, 112
Mercantile National Bank v. Langdeau, 371 U. S. 555 (1963) 28

PAGE

Metropolitan Cas. Ins. Co. v. Stevens, 312 U. S. 563 (1941) 77
Meyers v. United States, 116 F. 2d 601 (5th Cir. 1940) 23
Missouri Pacific Ry. Co. v. Fitzgerald, 160 U. S. 556 (1896) 30
Monroe v. Pape, 365 U. S. 167 (1961) 67, 112
Murray v. Louisiana, 163 U. S. 101 (1896) 79, 80

N.A.A.C.P. v. Button, 371 U. S. 415 (1963) 97
Neal v. Delaware, 103 U. S. 370 (1881) 77, 80, 81, 82, 92, 101, 102
New Jersey v. Weinberger, 38 F. 2d 298 (D. N. J. 1930) 86
New York v. Galamison, 342 F. 2d 255 (2d Cir. 1965) 33, 89, 105, 108, 109, 110, 111
Norris v. Alabama, 294 U. S. 587 (1935) 75
North Carolina v. Alston, 227 F. Supp. 887 (M. D. N. C. 1964) 85
North Carolina v. Jackson, 135 F. Supp. 682 (M. D. N. C. 1955) 86
Nye v. United States, 313 U. S. 33 (1941) 18, 23

O'Neal v. United States, 272 F. 2d 412 (5th Cir. 1959) 33
Orr v. United States, 174 F. 2d 577 (2d Cir. 1949) 25

Parr v. United States, 351 U. S. 513 (1956) 24
Peacock v. City of Greenwood, 347 F. 2d 679 (5th Cir. 1965) 86, 104, 105, 108, 109, 111
People v. McLeod, 25 Wend. 482 (Sup. Ct. N. Y. 1841) 42
Platt v. Minnesota Mining & Mfg. Co., 376 U. S. 240 (1964) 29, 31
Pritchard v. Smith, 289 F. 2d 153 (8th Cir. 1961) 71

PAGE

Rachel v. Georgia, 342 F. 2d 336 (5th Cir. 1965), rehearing denied, 343 F. 2d 909 (5th Cir. 1965) 1
Railroad Co. v. Wiswall, 90 U. S. (23 Wall.) 507 (1874) 28, 30
Rand v. Arkansas, 191 F. Supp. 20 (W. D. Ark. 1961) 86
Reconstruction Finance Corp. v. Prudence Securities Advisory Group, 311 U. S. 579 (1941) 34
Reece v. Georgia, 350 U. S. 85 (1955) 75
Reed v. Madden, 87 F. 2d 846 (8th Cir. 1937) 41
Robinson v. Florida, 345 F. 2d 133 (5th Cir. 1965) 86
Roche v. Evaporated Milk Assn., 319 U. S. 21 (1943) 31
Roth v. Bird, 239 F. 2d 257 (5th Cir. 1956) 33

Schlagenhauf v. Holder, 379 U. S. 104 (1964) 31
Schoen v. Mountain Producers Corp., 170 F. 2d 707 (3d Cir. 1948) 25
Scott v. Sandford, 60 U. S. (19 How.) 393 (1857) 56
Semel v. United States, 158 F. 2d 229 (5th Cir. 1946) 26
Smith v. California, 361 U. S. 147 (1959) 97
Smith v. Mississippi, 162 U. S. 592 (1896) 79, 80
Snypp v. Ohio, 70 F. 2d 535 (6th Cir. 1934) 86
Societe Internationale Pour Participations Industrielles et Commerciales, S.A., v. McGrath, 180 F. 2d 406 (D. C. Cir. 1950) 33
Strauder v. West Virginia, 100 U. S. 303 (1880) 73, 78, 93, 94, 100, 103

Tennessee v. Davis, 100 U. S. 257 (1880) 41
Texas v. Dorris, 165 F. Supp. 738 (S. D. Tex. 1958) 86
Thomas v. Mississippi, 380 U. S. 524 (1965) 97
Thomas v. State, 160 So. 2d 657 (1964) 97

PAGE

Townsend v. Sain, 372 U. S. 293 (1963) 92, 111
Turner v. Farmers' Loan & Trust Co., 106 U. S. 552 (1882) 30

United States v. Healy, 376 U. S. 75 (1964) 23
United States v. Lipsett, 156 Fed. 65 (W. D. Mich. 1907) 41
United States v. Rice, 327 U. S. 742 (1946) 30
United States v. Roth, 208 F. 2d 467 (2d Cir. 1953) 26
United States v. Smith, 331 U. S. 469 (1947) 29
United States v. Stromberg, 227 F. 2d 903 (5th Cir. 1955) 33
United States v. Williams, 227 F. 2d 149 (4th Cir. 1955) 26
United States v. Wood, 295 F. 2d 772 (5th Cir. 1961) 29
United States ex rel. Coy v. United States, 316 U. S. 342 (1942) 23
United States ex rel. Drury v. Lewis, 200 U. S. 1 (1906) 41
United States ex rel. Flynn v. Fuelhart, 106 Fed. 911 (C. C. W. D. Pa. 1901) 41
United States Alkali Export Assn. v. United States, 325 U. S. 196 (1945) 31

Van Dusen v. Barrack, 376 U. S. 612 (1964) 31
Van Newkirk v. District Attorney, 213 F. Supp. 61 (E. D. N. Y. 1963) 86
Virginia v. Rives, 100 U. S. 313 (1880) 60, 61, 74, 76, 77, 78, 81, 82, 89, 90, 92, 93, 95, 96, 98, 99, 100, 101, 102, 103

PAGE

Walker v. Georgia, 381 U. S. 355 (1965) 103
Wechsler v. County of Gadsden, 351 F. 2d 311 (5th Cir. 1965) 86
West Virginia v. Laing, 133 Fed. 887 (4th Cir. 1904) 41
Williams v. Mississippi, 170 U. S. 213 (1898) 80

CONSTITUTIONAL AND STATUTORY PROVISIONS

U. S. Const., Art. VI, cl. 2 2
U. S. Const., Amend. XIII 62, 70
U. S. Const., Amend. XIV 2, 66, 67, 70, 77
U. S. Const., Amend. XV 66, 70, 77

18 U. S. C. §242 (1964) 57
18 U. S. C. §1404 (1964) 22, 24
18 U. S. C. §3731 (1964) 22, 26
18 U. S. C. §3771 (1964) 19
18 U. S. C. §3772 (1964) 18
28 U. S. C. §1257 (1964) 91
28 U. S. C. §1291 (1964) 26, 29
28 U. S. C. §1331 (1964) 69
28 U. S. C. §1343(3) (1964) 68
28 U. S. C. §1441 (1964) 37, 69
28 U. S. C. §1442(a)(1) (1964) 41, 107
28 U. S. C. §1443 (1964) 2, 9, 16, 24, 25, 28, 29, 35, 36, 55, 70, 87, 89, 99, 117, 118
28 U. S. C. §1443(1) (1964) 11, 13, 14, 15, 35, 60, 72, 73, 76, 78, 88, 89, 90, 103, 104, 105, 107, 108, 110, 111, 114
28 U. S. C. §1443(2) (1964) 11, 13, 15, 57, 60, 73, 88, 89, 90, 104, 105, 107, 108, 110, 111, 113, 114

PAGE

28 U. S. C. §1444 (1964) 37
28 U. S. C. §1446(a) (1964) 2, 3, 89, 117
28 U. S. C. §1446(c) (1964) 74
28 U. S. C. §1446(e) (1964) 17
28 U. S. C. §1447(d) (1964) 2, 3, 12, 24, 28
28 U. S. C. §1651 (1964) 2, 29, 34
28 U. S. C. §2106 (1964) 25, 116
28 U. S. C. §2107 (1964) 23
28 U. S. C. §2241(c)(2) (1964) 41
28 U. S. C. §2251 (1964) 53
42 U. S. C. §1981 (1964) 65
42 U. S. C. §1983 (1964) 65, 68
42 U. S. C. §1988 (1964) 71
42 U. S. C. §2000a (1964) 2
42 U. S. C. §2000a-2 (1964) 2, 6

Rev. Stat. §641 (1875) 64, 69, 70, 73, 74, 77, 78, 85, 106
Rev. Stat. §643 (1875) 106
Rev. Stat. §722 (1875) 71
Rev. Stat. §1977 (1875) 65
Rev. Stat. §1979 (1875) 65, 68

28 U. S. C. §74 (1940) 64, 70
28 U. S. C. §76 (1940) 117
28 U. S. C. §230 (1940) 23
28 U. S. C. §1447(d) (1958) 25, 27, 30, 73

Act of September 24, 1789, ch. 20, 1 Stat. 73 38
Act of September 24, 1789, ch. 20, §11, 1 Stat. 78 38
Act of September 24, 1789, ch. 20, §12, 1 Stat. 79 39
Act of September 24, 1789, ch. 20, §14, 1 Stat. 81 39
Act of February 13, 1801, ch. 4, §11, 2 Stat. 89, 92, repealed by Act of March 8, 1802, ch. 8, 2 Stat. 132 38

PAGE

Act of February 4, 1815, ch. 31, §8, 3 Stat. 198 40
Act of March 3, 1815, ch. 93, §6, 3 Stat. 233 40
Act of March 3, 1817, ch. 109, §2, 3 Stat. 396 40
Act of March 2, 1833, ch. 57, §1, 4 Stat. 632 40
Act of March 2, 1833, ch. 57, §2, 4 Stat. 632 40
Act of March 2, 1833, ch. 57, §3, 4 Stat. 633 40
Act of March 2, 1833, ch. 57, §5, 4 Stat. 634 40
Act of March 2, 1833, ch. 57, §7, 4 Stat. 634 41
Act of August 29, 1842, ch. 257, 5 Stat. 539 42
Act of March 3, 1863, ch. 81, 12 Stat. 755 ..... 43, 74
Act of March 3, 1863, ch. 81, §5, 12 Stat. 755 .....43, 48, 107
Act of March 7, 1864, ch. 20, §9, 13 Stat. 17 44
Act of June 30, 1864, ch. 173, §50, 13 Stat. 241 44
Act of April 9, 1866, ch. 31, §1, 14 Stat. 27 56
Act of April 9, 1866, ch. 31, §2, 14 Stat. 27 .....22, 57, 63
Act of April 9, 1866, ch. 31, §3, 14 Stat. 27 .....55, 56, 57
Act of May 11, 1866, ch. 80, 14 Stat. 46 49
Act of May 11, 1866, ch. 80, §3, 14 Stat. 46 74
Act of July 13, 1866, ch. 184, 14 Stat. 98 44
Act of July 13, 1866, §67, 14 Stat. 171 44
Act of July 13, 1866, §68, 14 Stat. 172 44
Act of July 16, 1866, ch. 200, §14, 14 Stat. 176 ..... 45, 46
Act of February 5, 1867, ch. 27, 14 Stat. 385 48
Act of February 5, 1867, ch. 28, 14 Stat. 385 53
Act of February 5, 1867, ch. 28, §1, 14 Stat. 386 ..... 53, 71
Act of May 31, 1870, ch. 114, 16 Stat. 140 66
Act of May 31, 1870, ch. 114, §1, 16 Stat. 140 66
Act of May 31, 1870, ch. 114, §§2-7, 16 Stat. 140 66
Act of May 31, 1870, ch. 114, §8, 16 Stat. 142 66
Act of May 31, 1870, ch. 114, §16, 16 Stat. 144 65
Act of May 31, 1870, ch. 114, §17, 16 Stat. 144 67

PAGE

Act of May 31, 1870, ch. 114, §18, 16 Stat. 144 67
Act of February 28, 1871, ch. 99, §16, 16 Stat. 438 68
Act of April 20, 1871, ch. 22, 17 Stat. 13 ..... 66, 68
Act of April 20, 1871, ch. 22, §1, 17 Stat. 13 65
Act of March 1, 1875, ch. 114, 18 Stat. 335 68
Act of March 3, 1875, ch. 137, §§1-2, 18 Stat. 470 68
Act of March 3, 1887, ch. 373, §2, 24 Stat. 553, as amended, Act of August 13, 1888, ch. 866, 25 Stat. 435 82

Judicial Code of 1911, ch. 231, §31, 36 Stat. 1096.....64, 70, 77, 106
Judicial Code of 1911, ch. 231, §33, 36 Stat. 1097, as amended by Act of August 23, 1916, ch. 399, 39 Stat. 532 117
Judicial Code of 1911, ch. 231, §297, 36 Stat. 1168 70

Act of September 6, 1916, ch. 448, §2, 39 Stat. 726 91
Act of February 24, 1933, ch. 119, §1, 47 Stat. 904 .... 18, 20
Act of March 8, 1934, ch. 49, 48 Stat. 399 18
Act of June 7, 1934, ch. 426, 48 Stat. 926 18
Act of June 25, 1936, ch. 804, 49 Stat. 1921 18
Act of June 29, 1940, ch. 445, 54 Stat. 688 19
Act of November 21, 1941, ch. 492, 55 Stat. 779 ..... 18, 19
Act of June 25, 1948, ch. 645, 62 Stat. 846 .....18, 19, 22
Act of May 24, 1949, ch. 139, §60, 63 Stat. 98 ..... 18, 19
Act of May 10, 1950, ch. 174, §1, 64 Stat. 158 19
Act of July 18, 1956, ch. 629, §201, 70 Stat. 573 24
Act of July 7, 1958, Pub. L. 85-508, §12, 72 Stat. 348 19
Act of March 18, 1959, Pub. L. 86-3, §14, 73 Stat. 11 19

PAGE

Civil Rights Act of 1964, Pub. L. 88-352, §201, 78 Stat. 243 ..... 3, 6, 12, 13, 14, 95, 96, 116
Civil Rights Act of 1964, Pub. L. 88-352, §203, 78 Stat. 244 ..... 7, 12, 13, 14, 95, 97, 98
Civil Rights Act of 1964, Pub. L. 88-352, §901, 78 Stat. 266 ..... 3, 12, 14, 24, 27, 73

Ga. Code Ann., §26-3005 (1965 Cum. Supp.) 7, 11, 115

Acts of Virginia, 1865-1866 (Act of Jan. 15, 1866) 62

RULES OF COURT

Fed. Rule Civ. Pro. 1 ..... 23, 29
Fed. Rule Civ. Pro. 8(a) 117
Fed. Rule Civ. Pro. 73(a) 23
Fed. Rule Civ. Pro. 81(b) 29
Fed. Rule Crim. Pro. 32(d) 22
Fed. Rule Crim. Pro. 33 22
Fed. Rule Crim. Pro. 34 22
Fed. Rule Crim. Pro. 35 22
Fed. Rule Crim. Pro. 37(a)(1) 20, 24
Fed. Rule Crim. Pro. 37(a)(2) 7, 13, 17, 18, 20, 22, 24, 25, 26
Fed. Rule Crim. Pro. 37(b) 24
Fed. Rule Crim. Pro. 37(c) 24
Fed. Rule Crim. Pro. 38(a) 24
Fed. Rule Crim. Pro. 38(b) 24
Fed. Rule Crim. Pro. 38(c) 24
Fed. Rule Crim. Pro. 39 24

PAGE

Fed. Rule Crim. Pro. 54(b)(1) 17
Fed. Rule Crim. Pro. 57(b) 24
Fed. Rule Crim. Pro. 59 17

Orders Prescribing Rules of Court:

292 U. S. 661 19
327 U. S. 825 ..... 8, 20, 21, 23
335 U. S. 917 21
335 U. S. 949 21
346 U. S. 941 21
350 U. S. 1019 ..... 21, 22

Letter of Transmittal of Federal Criminal Rules (1944), 327 U. S. 823 21

LEGISLATIVE MATERIALS

H. Rep. No. 304, 80th Cong., 1st Sess. (1947) 18, 19, 23
H. Rep. No. 308, 80th Cong., 1st Sess. (1947) 70
H. Rep. No. 352, 81st Cong., 1st Sess. (1949), 2 U. S. Code Cong. Serv., 81st Cong., 1st Sess. (1949) 18, 19

9 Cong. Deb. (1833) 42

Cong. Globe, 27th Cong., 2d Sess. (1942) 43
Cong. Globe, 37th Cong., 3d Sess. (Jan. 27, 1863) 44
Cong. Globe, 39th Cong., 1st Sess. (1866) 45, 46, 47, 48, 49, 50, 53, 57, 58, 61, 62, 63, 64, 65, 108, 112

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PAGE

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2 Commager, Documents of American History (6th ed. 1958) 61

Dunning, Essays on the Civil War and Reconstruction (1898) 46

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PAGE

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Brief for Respondents Rachel et al., in Georgia v. Tuttle, 377 U. S. 987 (1964) 12, 25, 103

Petition for Certiorari, Anderson v. City of Chester, O. T. 1965, No. 443 35

In the

Supreme Court of the United States

October Term, 1965

No. 147

Georgia,

Petitioner,

—v.—

Thomas Rachel, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS

Opinions Below

The opinions below are appropriately referred to in Georgia's Brief (Br. 1-2). The opinion supporting the judgment here for review is reported as *Rachel* v. *Georgia*, 342 F. 2d 336 (5th Cir. 1965) (R. 20). Rehearing was denied at 343 F. 2d 909 (5th Cir. 1965) (R. 51).

Jurisdiction

The grounds on which the jurisdiction of this Court rests are appropriately stated in the first paragraph and the first sentence of the second paragraph of the section titled "Jurisdiction" in Georgia's Brief (Br. 2). This Court might

also review the remand order of the district court (R. 5-9) as on petition for an original writ of mandamus directed to that court. 28 U. S. C. §1651 (1964); *Ex parte Peru*, 318 U. S. 578 (1943). Should this Court deem the exercise of the latter jurisdiction appropriate, respondents respectfully request that the Court consider this Brief as a petition for mandamus, together with a motion for leave to file the petition. See pp. 34-35 *infra*.

Constitutional Provisions, Statutes and Rules Involved

1. The case involves the Supremacy Clause, Art. VI, cl. 2, of the Constitution of the United States and the Fourteenth Amendment to the Constitution.

2. The following statutes and rules are also involved:

28 U. S. C. §1443 (1964):

§1443. *Civil rights cases.*

Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

(2) For any act under color of authority derived from any law providing for equal rights, or for refus-

ing to do any act on the ground that it would be inconsistent with such law.

28 U. S. C. §1446(a) (1964):

§1446. *Procedure for removal.*

(a) A defendant or defendants desiring to remove any civil action or criminal prosecution from a State court shall file in the district court of the United States for the district and division within which such action is pending a verified petition containing a short and plain statement of the facts which entitle him or them to removal together with a copy of all process, pleadings and orders served upon him or them in such action.

28 U. S. C. §1447(d) (1964) (as amended by Civil Rights Act of 1964, Pub. L. 88-352, §901, 78 Stat. 266):

§1447. *Procedure after removal generally.*

(d) An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise.

Civil Rights Act of 1964, Pub. L. 88-352, §§201, 203, 78 Stat. 243-244, 42 U. S. C. §§2000a, 2000a-2 (1964):

§2000a. *Prohibition against discrimination or segregation in places of public accommodation.*

(a) *Equal access.*

All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges,

advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.

(b) *Establishments affecting interstate commerce or supported in their activities by State action as places of public accommodation; lodgings; facilities principally engaged in selling food for consumption on the premises; gasoline stations; places of exhibition or entertainment; other covered establishments.*

Each of the following establishments which serves the public is a place of public accommodation within the meaning of this subchapter if its operations affect commerce, or if discrimination or segregation by it is supported by State action:

(1) any inn, hotel, motel, or other establishment which provides lodging to transient guests, other than an establishment located within a building which contains not more than five rooms for rent or hire and which is actually occupied by the proprietor of such establishment as his residence;

(2) any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility principally engaged in selling food for consumption on the premises, including, but not limited to, any such facility located on the premises of any retail establishment; or any gasoline station;

(3) any motion picture house, theater, concert hall, sports arena, stadium or other place of exhibition or entertainment; and

(4) any establishment (A)(i) which is physically located within the premises of any establishment otherwise covered by this subsection, or (ii) within the premises of which is physically located any such covered establishment, and (B) which holds itself out as serving patrons of such covered establishment.

(c) *Operations affecting commerce; criteria; "commerce" defined.*

The operations of an establishment affect commerce within the meaning of this subchapter if (1) it is one of the establishments described in paragraph (1) of subsection (b) of this section; (2) in the case of an establishment described in paragraph (2) of subsection (b) of this section, it serves or offers to serve interstate travelers of [sic] a substantial portion of the food which it serves, or gasoline or other products which it sells, has moved in commerce; (3) in the case of an establishment described in paragraph (3) of subsection (b) of this section, it customarily presents films, performances [,] athletic teams, exhibitions, or other sources of entertainment which move in commerce; and (4) in the case of an establishment described in paragraph (4) of subsection (b) of this section, it is physically located within the premises of, or there is physically located within its premises, an establishment the operations of which affect commerce within the meaning of this subsection. For purposes of this section, "commerce" means travel, trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia and any State, or between any foreign country or any territory or possession and any State or the District of Colum-

bia, or between points in the same State but through any other State or the District of Columbia or a foreign country.

(d) *Support by State action.*

Discrimination or segregation by an establishment is supported by State action within the meaning of this subchapter if such discrimination or segregation (1) is carried on under color of any law, statute, ordinance, or regulation; or (2) is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof; or (3) is required by action of the State or political subdivision thereof.

(e) *Private establishments.*

The provisions of this subchapter shall not apply to a private club or other establishment not in fact open to the public, except to the extent that the facilities of such establishment are made available to the customers or patrons of an establishment within the scope of subsection (b) of this section. (Pub. L. 88-352, title II, §201, July 2, 1964, 78 Stat. 243.)

§2000a-2. *Prohibition against deprivation of, interference with, and punishment for exercising rights and privileges secured by section 2000a or 2000a-1 of this title.*

No person shall (a) withhold, deny, or attempt to withhold or deny, or deprive or attempt to deprive, any persons of any right or privilege secured by section 2000a or 2000a-1 of this title, or (b) intimidate, threaten, or coerce, or attempt to intimidate, threaten,

or coerce any person with the purpose of interfering with any right or privilege secured by section 2000a or 2000a-1 of this title, or (c) punish or attempt to punish any person for exercising or attempting to exercise any right or privilege secured by section 2000a or 2000a-1 of this title. (Pub. L. 88-352, title II, §203, July 2, 1964, 78 Stat. 244.)

Ga. Code Ann. §26-3005 (1965 Cum. Supp.):

26-3005. *Refusal to leave premises of another when ordered to do so by owner or person in charge.*—It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor. (Acts 1960, p. 142.)

Fed. Rule Crim. Pro. 37(a)(2):

(2) *Time for Taking Appeal.* An appeal by a defendant may be taken within 10 days after entry of the judgment or order appealed from, but if a motion for a new trial or in arrest of judgment has been made within the 10-day period an appeal from a judgment of conviction may be taken within 10 days after entry of the order denying the motion. When a court after trial imposes sentence upon a defendant not represented by counsel, the defendant shall be advised of his right to appeal and if he so requests, the clerk shall prepare

and file forthwith a notice of appeal on behalf of the defendant. An appeal by the government when authorized by statute may be taken within 30 days after entry of the judgment or order appealed from.

Order of this Court, February 8, 1946, prescribing Rule 37(a)(2), 327 U. S. 825:

IT IS ORDERED on this eighth day of February, 1946, that the annexed Rules governing proceedings in criminal cases after verdict, finding of guilty or not guilty by the court, or plea of guilty, be prescribed pursuant to the Act of February 24, 1933, c. 119, as amended (47 Stat. 904; U. S. Code, Title 18, §688) for the District Courts of the United States, the United States Circuit Courts of Appeals, the United States Court of Appeals for the District of Columbia, and the Supreme Court of the United States, and that said Rules shall become effective on the twenty-first day of March, 1946.

IT IS FURTHER ORDERED that these Rules and the Rules heretofore promulgated by order dated December 26, 1944, governing proceedings prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty, shall be consecutively numbered as indicated and shall be known as the Federal Rules of Criminal Procedure.

FEBRUARY 8, 1946.

Questions Presented

I. Whether the court of appeals had jurisdiction to review an order of the district court remanding to the appropriate state court state criminal cases removed pursuant to 28 U. S. C. §1443 (1964) where notice of appeal was filed sixteen days after the date of the remand order.

II. Whether a removal petition which alleges that the petitioners are being prosecuted on state criminal trespass charges for their conduct in attempting to obtain equal service without racial discrimination in restaurants covered by the public accommodations title of the Civil Rights Act of 1964 thereby states a case for removal under 28 U. S. C. §1443 (1964).

III. Whether, as a matter of pleading, respondents' removal petition sufficiently alleges that they are being prosecuted on state criminal trespass charges for their conduct in attempting to obtain equal service without racial discrimination in restaurants covered by the public accommodations title of the Civil Rights Act of 1964.

IV. Whether the court of appeals properly directed the district court, in remanding the case to it for hearing on the allegations of the removal petition, to assume jurisdiction if it were proved that respondents had been arrested and charged for seeking service which was denied them "for racial reasons" at the places of public accommodation named in their petition.

Statement of the Case

February 17, 1964, the twenty respondents (hereafter called defendants as they were in the district court) filed in the United States District Court for the Northern District of Georgia their petition for removal of state criminal trespass charges pending against them for trial in the Superior Court of Fulton County, Georgia (R. 1-5). The petition alleged that defendant Rachel and seven other defendants "were arrested on June 17, 1963 when they sought to obtain service, food, entertainment and comfort at Lebco, Inc., d/b/a Leb's, a privately owned restaurant opened to the general public, 66 Luckie Street, Atlanta, Fulton County, Georgia" (R. 2). The remaining defendants were arrested at Leb's on other dates in May or June of 1963, or at one of four other restaurants, cafeterias or hotels opened to the general public on dates between March and June of 1963 (R. 2-3). Each establishment where arrests were made was identified in the petition by name and street location in the city of Atlanta (R. 2-3), except that no street location was recited for the Henry Grady Hotel, which was alleged to be "built on real estate owned by the State of Georgia but leased for a term of years to the H. & G. Hotel Corporation" (R. 3). Several of the defendants were arrested in attempts to obtain service at more than one of these establishments and/or on more than one date (R. 2-3). "[T]heir arrests were effected for the sole purpose of aiding, abetting, and perpetuating customs, and usages which have deep historical and psychological roots in the mores and attitudes which exist within the City of Atlanta with respect to serving and seating members of the Negro race in such places of public accommodation and con-

venience upon a racially discriminatory basis and upon terms and conditions not imposed upon members of the so-called white or Caucasian race. Members of the so-called white or Caucasian race are similarly treated and discriminated against when accompanied by members of the Negro race" (R. 1-2). Each defendant was subsequently indicted under Georgia's 1960 criminal trespass statute, GA. CODE ANN. §26-3005 (1965 Cum. Supp.), penalizing refusal to leave premises on request of the owner (see p. 7 *supra*) (R. 3-4).

Prosecutions growing out of these arrests and indictments were sought to be removed to the federal court under authority of 28 U. S. C. §§1443(1), (2) (1964), p. 2 *supra* (R. 4), "to protect the rights guaranteed . . . under the due process and equal protection clauses of [the] . . . Fourteenth Amendment . . . and to protect the right of free speech, association and assembly guaranteed by the First Amendment . . . " (R. 4). It was alleged that the defendants were prosecuted for acts under color of authority derived from the federal Constitution and laws (R. 4), and that they were denied and could not enforce in the Georgia courts their rights under federal law providing for equal rights, "in that, among other things, the State of Georgia by statute, custom, usage, and practice supports and maintains a policy of racial discrimination" (R. 4).

February 18, 1964, District Judge Boyd Sloan, *sua sponte* and without hearing, remanded the prosecutions to the Superior Court of Fulton County (R. 5-9). March 5, 1964, defendants filed a notice of appeal from that order (R. 9). March 12, they filed in the Court of Appeals for the Fifth Circuit a motion for a stay of the remand order (App. 1a-3a, *infra*). The same day, Georgia filed a motion to dismiss

the appeal (R. 10-13). That date, March 12, 1964, the court of appeals granted defendants' motion for a stay and postponed the disposition of Georgia's motion to dismiss until hearing on the merits (R. 13-14). Georgia thereupon moved this Court for leave to file a petition for prerogative writs, commanding the judges of the court of appeals to vacate their stay order and proceed no further with the appeal. June 22, 1964, the Court denied the motion without opinion. *Georgia* v. *Tuttle*, 377 U. S. 987 (1964).*

July 2, 1964, the Civil Rights Act of 1964 was enacted into law. Pub. L. 88-352, 78 Stat. 241. December 14, 1964, this Court held in *Hamm* v. *City of Rock Hill*, 379 U. S. 306 (1964), that sections 201 and 203 of that act, portions of the public accommodations title, see pp. 3-7 *supra*, precluded state criminal trespass conviction of sit-in demonstrators who had refused to leave covered establishments from which they were ordered for racial reasons, even though the sit-ins occurred, and their prosecutions had been instituted, prior to the effective date of the 1964 act. March 5, 1965, the court of appeals rendered its opinion and judgment in the present case, reversing the remand order of the district court (R. 20-36). Sustaining its appellate jurisdiction under 28 U. S. C. §1447(d) (1964), as amended by section 901 of the Civil Rights Act of 1964, 78 stat. 266, the court held that defendants' removal petition adequately alleged that their prosecutions were in violation of sections 201 and 203 of the act as construed in *Hamm*. The court concluded that, if these allegations were true, criminal prosecution of defendants in the Georgia courts denied them their rights

* For the events leading up to this prerogative writ proceeding, see the documents in the Appendix to Brief for Respondents Rachel et al., *Georgia* v. *Tuttle*, 377 U. S. 987 (1964), pp. 24-51.

under §§201 and 203, and made them unable to enforce these rights, within the meaning of the civil rights removal statute's first subsection, 28 U. S. C. §1443(1). Without reaching any question of the removal petition's sufficiency under §1443(2), the court of appeals therefore remanded the case to the district court for hearing, instructing the district court to give the defendants "an opportunity to prove the allegations in the removal petition as to the purpose of the arrests and prosecutions, and in the event it is established that the removal of the [defendants] . . . from the various places of public accommodations was done for racial reasons, then under authority of the *Hamm* case," to accept removal jurisdiction and dismiss the prosecutions (R. 31-32). Georgia's petition for rehearing *en banc* (R. 37-49) was denied April 19, 1965 (R. 51), and this Court granted Georgia's petition for certiorari October 11, 1965 (R. 52).

Summary of Argument

I.

The court of appeals did not lack jurisdiction to review the remand order by reason of untimeliness in filing defendants' notice of appeal. The notice was timely filed. The ten-day appeal period limited by FED. RULE CRIM. PRO. 37(a)(2) was prescribed under this Court's post-verdict criminal rule-making power and, by the terms of the order prescribing it, has no application to appeals before verdict in criminal cases.

Even were Criminal Rule 37(a)(2) applicable, the court of appeals had jurisdiction to proceed as on petition for mandamus, without limitation of time. The prerogative writ

is the traditional and accepted mode of review of remand orders, and section 901 of the Civil Rights Act of 1964 preserves it as an alternative to appeal. The court of appeals had the power to treat the present proceeding as before it on petition for the writ. Should its appellate jurisdiction be held wanting, the case ought to be remanded to that court for its determination whether to entertain it as a prerogative writ proceeding.

However, this Court need not decide any question of the jurisdiction of the court of appeals in order to reach the significant and pressing question of removability which the case presents. The Court might review the remand order of the district court as on an original petition for mandamus to that court. The importance of expeditious construction of the civil rights removal statute justifies the exercise of the Court's discretion to so proceed.

II.

Persons criminally prosecuted for attempts to obtain desegregated restaurant service in the exercise of their equal civil rights under the public accommodations title of the Civil Rights Act of 1964 are thereby denied these rights, and made unable to enforce them, within the meaning of 28 U. S. C. §1443(1). Pending prosecution constitutes intimidation and punishment forbidden by section 203 of the 1964 act and an impermissible repression of the right to restaurant service free of racial discrimination given by section 201. Federal removal jurisdiction is required to protect this right from destruction by mesne process during the delays incident to state court criminal proceedings. Therefore, persons prosecuted may sustain removal under §1443(1) without inquiry into the questions whether the

state statute under which they are charged is unconstitutional on its face or whether the state courts will not fairly entertain their federal defenses. The former inquiry is required by the decisions of this Court only where federal procedural rights, not where federal substantive rights, are implicated in the state prosecution. The latter inquiry is entirely impracticable, and is never required under §1443(1).

Persons prosecuted for the exercise of their right to equal public accommodations under the Civil Rights Act of 1964 are also thereby prosecuted for an act under color of authority derived from the 1964 legislation, within the meaning of 28 U. S. C. §1443(2). The legislative history of §1443(2) and its context in the present Judicial Code indicate that its protection is available to private individuals, not merely to federal officers and those acting under them. As applied to private individuals, "color of authority" derived from civil rights law means the license to act which these laws give, free of every sort of repression. In no other sense do federal civil rights laws give authority to private conduct.

Narrow construction of the civil rights removal jurisdiction would defeat the great purpose of the Reconstruction Congresses to extend effective federal judicial protection to the civil liberties which the post-war Amendments guaranteed. The liberties secured by these Amendments and by federal civil rights legislation are perpetually in jeopardy so long as state criminal proceedings may be used to harass the individuals who dare exercise them. The civil rights removal jurisdiction is a needed shield against such harassment.

III.

Defendants' removal petition was not deficient as a pleading. It sufficiently alleged each of the three elements required for removal under a proper construction of 28 U. S. C. §1443: that defendants were (1) prosecuted for criminal trespass for refusal to leave (2) places of public accommodation covered by the Civil Rights Act of 1964, (3) where they were ordered out and then arrested by reason of racial discrimination.

IV.

The court of appeals properly directed the district court, in remanding the case to it for hearing on the allegations of the petition, to determine whether the trespass charges against defendants arose from their refusals to leave places of public accommodation which they were ordered to leave for racial reasons. Such a showing brings defendants within the protection of the public accommodations sections of the Civil Rights Act of 1964, hence of the removal statute. Georgia does not and cannot seriously contest coverage of the restaurants in question under the 1964 act, and the attack made on the foreclosing of other issues on remand demonstrates only Georgia's misconstruction of the removal statute or the court of appeals' opinion.

ARGUMENT

I.

The Court of Appeals Did Not Lack Jurisdiction of the Appeal by Reason of Asserted Untimeliness in Filing the Notice of Appeal.

Because defendants' notice of appeal, March 5, 1964 (R. 9), was filed more than ten days after the district court's order of February 18, 1964 (R. 5-9) remanding their prosecutions to the state trial court, Georgia urges that the court of appeals lacked jurisdiction to entertain any proceeding by defendants for review of that order (Br. 13-29). The argument is that these removed prosecutions are criminal proceedings (Br. 21); that the Federal Rules of Criminal Procedure apply to them by virtue of Rules 54(b)(1) and 59 (Br. 21-28); that therefore the ten-day appeal period of Rule 37(a)(2) governs the case (Br. 13-21); and that failure to file a notice of appeal within the ten-day period is fatal to the jurisdiction of the court of appeals (Br. 29). Defendants have no controversy with any but the essential part of this. They agree that their prosecution is criminal, that the Federal Criminal Rules govern it at every stage subsequent to the perfection of federal removal jurisdiction by filing and service of their removal petition (see 28 U. S. C. §1446(e) (1964)) on February 17, 1964 (R. 1-5), and that any applicable appeal period fixed by those rules goes to the jurisdiction of the circuit court. They share the view of that court, however, that the ten-day period of Rule 37(a)(2) does not apply to pre-verdict appeals in any criminal case, removed or original, governed by the Criminal Rules. And they assert, in any event, that the court

of appeals clearly had jurisdiction to review the remand order by prerogative writ, unencumbered by the time limited by any rule governing appeal.

A. As Rule 37(a)(2) Has No Application to Pre-Verdict Appeals, the Notice of Appeal Was Timely Filed.

This Court's power to make rules governing practice and procedure in federal criminal proceedings derives from two distinct sources. By the Act of February 24, 1933, ch. 119, §1, 47 Stat. 904, amended by the Act of March 8, 1934, ch. 49, 48 Stat. 399, the Court was authorized to promulgate "rules of practice and procedure with respect to any or all proceedings after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty, in criminal cases. . . ." That authority is presently codified, substantially unchanged, in 18 U. S. C. §3772 (1964), as amended.[1] Rules

[1] The 1933 act authorized rule-making with respect to proceedings "after verdict." Its 1934 amendment expanded the authority to proceedings "after verdict, or finding of guilt by the court if a jury has been waived, or plea of guilty," apparently for the reason that no distinction seemed justified in post-conviction rules for jury-tried and jury-waived cases. See *Nye* v. *United States*, 313 U. S. 33, 44 (1941). The *Nye* case held that this language failed to reach proceedings for criminal contempt. Congress responded by the Act of November 21, 1941, ch. 492, 55 Stat. 779, extending the 1933 authorization to criminal contempt cases. These three statutes were the basis for present 18 U. S. C. §3772, enacted in the criminal code revision of 1948. Act of June 25, 1948, ch. 645, 62 Stat. 846-847. (The revisers' note also mentions the Act of June 7, 1934, ch. 426, 48 Stat. 926, and the Act of June 25, 1936, ch. 804, 49 Stat. 1921, which changed the names of the trial and appellate courts in the District of Columbia; the 1948 revision itself made some other changes in phraseology but none in substance. See H. Rep. No. 304, 80th Cong., 1st Sess. A177-A178 (1947).) Section 3772 was amended by the Act of May 24, 1949, ch. 139, §60, 63 Stat. 98, to correct the nomenclature of several courts and a typographical error, see H. Rep. No. 352, 81st Cong., 1st Sess. (1949), 2 U. S. Code Cong. Serv., 81st Cong., 1st Sess., 1949, 1264; amendments in 1958 and 1959 merely accommodated

announced under it (which we may call in shorthand "post-verdict rules") become effective without submission to Congress. By the Act of June 29, 1940, ch. 445, 54 Stat. 688, the Court was authorized to prescribe "rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases . . . ." This second authority is presently codified, substantially unchanged, in 18 U. S. C. §3771 (1964), as amended.[2] Rules announced under it (which we may call in shorthand "pre-verdict rules") become effective only upon submission to Congress.

The Court first exercised its post-verdict rule-making authority by an order dated May 7, 1934 which explicitly invoked the 1933-1934 legislation, see 292 U. S. 661, in adopting eleven rules "as the Rules of Practice and Pro-

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the admission to statehood of Alaska and Hawaii respectively. Act of July 7, 1958, Pub. L. 85-508, §12(1), 72 Stat. 348; Act of March 18, 1959, Pub. L. 86-3, §14(h), 73 Stat. 11.

[2] The Act of November 21, 1941, ch. 492, 55 Stat. 779, extended the pre-verdict 1940 authorization, as well as the post-verdict 1933 authorization, to criminal contempt cases. See note 1 *supra*. The 1940 and 1941 acts were codified in 1948 as 18 U. S. C. §3771. Act of June 25, 1948, ch. 645, 62 Stat. 846; see H. Rep. No. 304, 80th Cong., 1st Sess. A-177 (1947). The Act of May 24, 1949, ch. 139, §59, 63 Stat. 98, made some changes in judicial nomenclature and authorized transmission of the rules to Congress by the Chief Justice instead of by the Attorney General as theretofore, see H. Rep. No. 352, 81st Cong., 1st Sess. (1949), 2 U. S. Code Cong. Serv., 81st Cong., 1st Sess., 1949, 1264. The Act of May 10, 1950, ch. 174, §1, 64 Stat. 158 altered the time at which the rules might be submitted to Congress and the period after submission when they were to take effect. Acts in 1958 and 1959 amended language in the section to accommodate the admission to statehood of Alaska and Hawaii respectively. Act of July 7, 1958, Pub. L. 85-508, §12(k), 72 Stat. 348; Act of March 18, 1959, Pub. L. 86-3, §14(g), 73 Stat. 11.

cedure in all proceedings after plea of guilty, verdict of guilt by a jury or finding of guilt by the trial court where a jury is waived, in criminal cases . . . ." *Ibid.* Rule III, governing appeals, prescribed that appeal should be "taken within five (5) days after entry of judgment of conviction" (except where a motion for new trial was pending), abolished petitions for allowance of appeal and citations, provided that appeal should be taken by filing a notice of appeal in duplicate in the district court and serving it on the government, and described its contents. 292 U. S. 662-663. In 1946, by order dated February 8, the Court prescribed Rules 32 to 39 of the new Federal Rules of Criminal Procedure, effective March 21, 1946. 327 U. S. 821, 825. It was thereby ordered that these "Rules governing proceedings in criminal cases after verdict, finding of guilty or not guilty by the court, or plea of guilty, be prescribed pursuant to the Act of February 24, 1933, c. 119, as amended (47 Stat. 904, U. S. Code, Title 18, §688)." 327 U. S. 825. Rule 37(a)(2) prescribed that appeal by a defendant should be "taken within 10 days after entry of the judgment or order appealed from" (unless a motion for new trial or in arrest of judgment was pending), required the court to advise an unrepresented defendant of his right to appeal following sentence after trial and the clerk to prepare and file a notice of appeal on request of such a defendant, and prescribed that an appeal by the government when authorized by statute should be "taken within 30 days after entry of the judgment or order apealed from." 327 U. S. 857-858. Rule 37(a)(1) provided that appeal should be taken by filing a notice of appeal in duplicate in the district court, described its form and contents, abolished petitions for allowance of appeal, citations and assignments of error, and directed the clerk of the district court to notify the adverse

party of the appeal and to forward the duplicate notice to the appellate court with a statement of docket entries. 327 U. S. 857. The rule, which was never submitted to Congress, is in substance present Rule 37(a); two subsequent amendments—both put into effect without submission to Congress—have not changed it in any respect material here.[3] On March 21, 1946 Rules 1 to 31 and 40 to 60 of the Federal Rules of Criminal Procedure also became effective. These had been prescribed to govern "proceedings in criminal cases prior to and including verdict, finding of guilty or not guilty by the court, or plea of guilty . . . pursuant to Act of June 29, 1940, ch. 445, 54 Stat. 688." (Letter of transmittal from Chief Justice Stone to Attorney General Biddle, December 26, 1944, 327 U. S. 823; see *id.* at 821.) They became effective following submission to Congress as required of pre-verdict rules by the 1940 act; subsequent amendments to them have similarly been submitted.[4]

Thus the procedural history and explicit language of the order promulgating Rule 37 make clear that it applies—because it can only apply—to appeals "after verdict, finding of guilty or not guilty by the court, or plea of guilty." 327 U. S. 825. To apply it to pre-verdict appeals would attribute to this Court disregard of the specific command of Congress that pre-verdict rules be submitted to its scrutiny before they take effect. Georgia's suggestion (Br.

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[3] By order dated December 27, 1948, effective January 1, 1949, the Court substituted the language "court of appeals" for "circuit court of appeals," conforming the rule to the phraseology of the Judicial Code revision of 1948. 335 U. S. 917-918. By order of April 12, 1954, effective July 1, 1954, contemporaneous with its adoption of Revised Rules of the Supreme Court, the Court rewrote Criminal Rule 37 to provide that appeals and petitions for certiorari to the Court were governed by its revised rules. 346 U. S. 941-942.

[4] E.g., 335 U. S. 949; 350 U. S. 1019.

16-17) that the codifiers' cross-reference to Rule 37 in the 1948 Criminal Code, Act of June 25, 1948, ch. 645, 62 Stat. 845, satisfies the submission requirement is extravagant. Apart from the consideration that this Court has since amended the Rule without resubmission, 346 U. S. 941-942; see note 3 *supra*, the cross-reference is palpably devoid of substantive effect and—even were it given such effect—could mean nothing more than acceptance of the rule in the form in which the Court promulgated it: as a post-verdict rule. Georgia also has the argument (Br. 17-19) that the 30-day limitation for government appeals in Rule 37(a)(2) compels construction of that rule as applicable to pre-verdict appeals. This would be the case only if all government appeals allowed by statute were pre-verdict appeals, but of course they are not. See 18 U. S. C. §3731 para. 7 (1964). Rule 37(a)(2) *is*, as Georgia suggests, "a nullity as to 'before verdict' appeals" by the government (Br. 18), where such appeals are authorized by statute. See 18 U. S. C. §§1404, 3731 para. 6 (1964). Its sole purpose is to assure that the 30-day limitations prescribed by each of these statutes, see the last sentence of §1104 and paragraph 8 of §3731, are not deprived of force by any implication derived from Rule 37. See 18 U. S. C. §3772, para. 3 (1964). Georgia's contention (Br. 19) that the limitation by Rule 37(a)(2) of a period of ten days "after entry of the judgment or order appealed from"—as contrasted with the limitation by former Rule III of a period "after entry of judgment of conviction," 292 U. S. 662,—comports a purpose of Rule 37(a)(2) to reach some pre-verdict "order," exhibits the same vice of reasoning. The contention would be tenable if no appealable "order" could be made in a criminal case after verdict; but see Rules 32(d), 33, 34, 35. The specification of "order" in Rule 37(a)(2) is un-

doubtedly designed principally to reach orders denying motions for correction of sentence under Rule 35, see *Heflin* v. *United States*, 358 U. S. 415, 418 n. 7 (1959), in light of the revelations of *United States ex rel. Coy* v. *United States*, 316 U. S. 342 (1942), and *Meyers* v. *United States*, 116 F. 2d 601 (5th Cir. 1940).

Indeed, Georgia's arguments in this aspect would hardly merit debate[5] but for the awkward circumstance that they point up a *casus omissus* in the Criminal Rules.[6] If Rule 37(a)(2) is properly read as applicable only to post-verdict appeals, there is no time limited by the Rules for pre-verdict appeals.[7] The omission is of scant practical signifi-

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[5] The order promulgating Rule 37 and its companion rules, containing an explicit restriction of their operation to post-verdict proceedings, 327 U. S. 825, came five years after *Nye* v. *United States*, 313 U. S. 33 (1941), had clearly established that such explicit restrictions "describe the kinds of cases to which [the rules] . . . are to be applied." *Id.* at 44.

[6] Obviously, foresight of every case which may arise in administration of a system of criminal rules is impossible, and it has previously occurred that *lacunae* have been discovered in the Federal Rules. See *United States ex rel. Coy* v. *United States*, 316 U. S. 342 (1942); *Lott* v. *United States*, 367 U. S. 421 (1961); *United States* v. *Healy*, 376 U. S. 75 (1964). One cardinal virtue of judicial rule-making is that such problems may be effectively corrected by the judiciary, whose concern they principally are, and that correction may be made without unfair surprise to individual litigants.

[7] Defendants agree with Georgia (Br. 27) that neither FED. RULE CIV. PRO. 73(a) nor 28 U. S. C. §2107 (1964) can be applied to limit the time for pre-verdict appeals in criminal cases. The reach of Rule 73 is restricted to civil actions by FED. RULE CIV. PRO. 1; and the similar restriction of §2107, in contrast to its predecessor, 28 U. S. C. §230 (1940), is not inadvertent. See H. REP. No. 308, 80th Cong., 1st Sess. A174 (1947). The exclusion of criminal appeals from the latter section by reason of the revisers' view that Criminal Rule 37 governed such appeals, cannot of course be taken to imply that the revisers or Congress thought Rule 37 applicable to pre-verdict criminal appeals. They, like this Court in promul-

cance, because the strong tradition against interlocutory criminal appeals in federal practice disallows pre-verdict appeal altogether except where expressly authorized by statute, see *DiBella* v. *United States*, 369 U. S. 121 (1962); *Cobbledick* v. *United States*, 309 U. S. 323 (1940); *Parr* v. *United States*, 351 U. S. 513 (1956), and each of the few extant statutory authorizations has a built-in limitations period. See 18 U. S. C. §§1404, 3731 (1964).[8] The sole exception is the statute under which the present case arises: 28 U. S. C. §1447(d) (1964), as amended by §901 of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 266, to provide that "an order remanding a case to the State court from which it was removed pursuant to section 1443 of [title 28] . . . shall be reviewable by appeal or otherwise."[9]

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gating the Criminal Rules, had no occasion to direct their attention to pre-verdict appeals—a rare form of proceeding whose timeliness was otherwise regulated by statute. When Congress did subsequently address the question—authorizing interlocutory appeals from suppression orders in narcotics cases by the Act of July 18, 1956, ch. 629, §201, 70 Stat. 573, 18 U. S. C. §1404 (1964)—it did not assume the applicability of Criminal Rule 37, but included a thirty-day limitation in the act.

[8] It is true, of course, that if Rule 37(a)(2) does not govern pre-verdict proceedings, neither do any of the provisions of Rules 32-39. This is not a matter of moment, however. Rules 32-36, the second sentence of Rule 37(a)(2), and Rule 38(a) are, by the nature of their provisions, inapplicable at pre-verdict stages. Rules 37(b), (c) and 38(b) are merely cross-references to other rules applicable of their own force. Rules 37(a)(1), 38(c) and 39 are chiefly housekeeping regulations; authority to proceed in the few rare pre-verdict appeals with respect to the matters covered by these rules is amply conveyed by Rule 57(b).

[9] The present case was removed, remanded, and an appeal from the remand order taken prior to the enactment of §901. The court below held that the statute nevertheless governed the case (R. 20-21), under the ordinary principle that procedural legislation—including legislation affecting the jurisdiction of particular courts e.g., *Bruner* v. *United States*, 343 U. S. 112 (1952)—is applied to

Even in §1443 (civil rights removal) cases, absence of a provision limiting the time for appeal of remand orders is of little importance because, as indicated in the next section of this brief, the traditional mode of review of remand orders by prerogative writ which was revived by the "otherwise" clause of the 1964 act is available beyond any time which might be limited for review by appeal. Whether review is sought by appeal or prerogative writ, the reviewing court does not lack power to refuse its process in cases of abusive delay by the party seeking review.[10] But if, in any event, some specific limitation of time for pre-verdict appeal should be thought desirable, "that problem and its kindred ones, brought to the fore in this case, [should be left] for resolution by the rule-making process," *Lott* v. *United States*, 367 U. S. 421, 425 (1961), rather than solved in jury-rig fashion by a judicial decision expanding present Rule 37(a)(2) beyond the plain scope of the order promulgating it and in violation of a plain legislative restriction

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litigation pending at the time of its passage. E.g., *Ex parte Collett*, 337 U. S. 55 (1949); *Orr* v. *United States*, 174 F. 2d 577 (2d Cir. 1949); *Schoen* v. *Mountain Producers Corp.*, 170 F. 2d 707 (3d Cir. 1948); *Bowles* v. *Strickland*, 151 F. 2d 419 (5th Cir. 1945); and see *Hoadley* v. *San Francisco*, 94 U. S. 4 (1876). Georgia has not challenged that ruling (see Petition for Certiorari 3-6; Pr. 4-7), and defendants see no need to labor the point or their alternative contention, urged when this case was last here prior to the Civil Rights Act of 1964, that former 28 U. S. C. §1447(d) (1958) did not prohibit review of the remand order by the court of appeals. See Brief for Respondents Rachel et al., in *Georgia* v. *Tuttle*, 377 U. S. 987 (1964), pp. 9-28, 32-44.

[10] As indicated at p. 32 *infra*, principles of laches would govern the timeliness of a petition for mandamus to review a remand order. Defendants see no reason why the same principles might not be applied, under 28 U. S. C. §2106 (1964), to refuse relief on appeal from a remand order in a case in which a criminal defendant inexcusably delayed taking his appeal until after the commencement of (or, perhaps, until the eve of) his post-remand state-court trial. No such case is presented by this record.

on the pre-verdict rule-making power. T' is solution proposed by Georgia is at best a partial one, half-sighted and unfair. Application of Rule 37(a)(2) to pre-verdict appeals in civil rights removal cases would impose a ten-day limit only on appeals "by a defendant." If a federal district court accepted removal jurisdiction and dismissed a prosecution—as was done, for example, in the Selma, Alabama cases, on authority of the decision below in the present case[11]—any state appeal from such an order within the jurisdiction given by 28 U. S. C. §1291 (1964) would remain unlimited as to time.[12] If the Civil Rights Act of 1964 has occasioned new sorts of interlocutory appeals, this Court by rules duly submitted to Congress can and should regulate them by prescriptions specifically and comprehensively addressed to their particular nature. Defendants submit that under the present rules there is no authority for holding their appeal untimely.[13]

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[11] *Alabama* v. *Boynton*, S. D. Ala. C. A. No. 3560-65, decided April 16, 1965.

[12] The thirty-day limitation upon appeals "by the government" in Rule 37(a)(2) could hardly be thought applicable to appeal by a State in a removed criminal case. As the advisory committee note on the rule indicates, that limitation was intended simply to reflect the thirty-day rule of the Criminal Appeals Act, 18 U. S. C. §3731 (1964).

[13] *United States* v. *Williams*, 227 F. 2d 149 (4th Cir. 1955), cited at Br. 18-19, is not persuasive. It is true that the Fourth Circuit, there dismissing a government appeal noted more than thirty days after dismissal of an indictment, assumed that Rule 37 governed the case. But the assumption is not supported by reasoning, and the dismissal was in any event compelled by the thirty-day limitation of 18 U. S. C. §3731 (1964). Cf. *United States* v. *Roth*, 208 F. 2d 467 (2d Cir. 1953). *Semel* v. *United States*, 158 F. 2d 229, 231 (5th Cir. 1946) (alternative ground), does apply Rules 37 and 39 to a pre-verdict appeal, but, again, without considered discussion.

B. The Court of Appeals Had Jurisdiction to Review the Remand Order by Proceedings in the Nature of Mandamus, as to Which No Time Is Limited by Rule.

But even should this Court accept Georgia's contention that the court of appeals lacked power to entertain defendants' appeal by reason of untimely filing, it could not properly reverse the decision below. The court of appeals plainly had jurisdiction to review the district court's remand order by proceedings in the nature of mandamus instituted more than ten days after the order. (See subsection (1) *infra.*) Defendants in their brief below invoked the discretion of that court to hear their case, in the event appeal proved abortive, by the prerogative writ. The court failed to consider such an exercise of discretion only because it sustained the appeal. If its holding on this latter point is now upset, the case must be remanded to the court of appeals for its determination, in light of its prior practice in such matters (see subsection (2) *infra*), whether it will ignore technical imperfections in the presentation of the proceeding and will entertain the attempted appeal as on petition for mandamus.

1. ***The Remand Order Is Reviewable by Mandamus.***

The court below rested its competence to review the remand order on 28 U. S. C. §1447(d), as amended by the Civil Rights Act of 1964, §901, 78 Stat. 266. Georgia has not challenged that ruling in this Court and it appears clearly correct.[14] Prior to the 1964 act, §1447(d) provided that "An order remanding a case to the State court from which it was removed is not reviewable on appeal or other-

[14] See note 9 *supra.*

wise."[15] The 1964 act added the language: "except that an order remanding a case to the State court from which it was removed pursuant to section 1443 of this title shall be reviewable by appeal or otherwise." By this somewhat blunderbuss language, Congress obviously intended principally to make the exception for §1443 cases coextensive with the general bar which §1447(d) imposes in all other removal cases:[16] the effect of the provision is to authorize review by any fit legal mode. "Appeal" is specified:[17] ac-

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[15] There is very substantial reason to believe that this section had no application to removed criminal cases, or to any cases removed under 28 U. S. C. §1443. See Brief for Respondents Rachel et al., in *Georgia* v. *Tuttle*, 377 U. S. 987 (1964), pp. 9-28, 32-44. Nevertheless, even those who held this belief recognized the desirability of explicit congressional exception of §1443 cases from the review bar. See Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 COLUM. L. REV. 1163, 1189-1190 (1963). Congress provided this explicit exception by the 1964 act.

[16] Dissatisfied with the restrictive reading which the district courts were giving §1443 on authority of "some old Supreme Court decisions which appear to hold that removal is proper only if the case involves a provision of a State constitution or a statute which on its face denies equal civil rights," 110 CONG. REC. 6955 (April 6, 1964) (remarks of Senator Dodd), and convinced that such a reading rendered the civil rights removal statute "practically useless," *ibid.*, Congress sought to give this Court "an opportunity to reexamine, in the light of existing conditions, the scope of the right to remove in certain civil rights cases," *id.* at 6551 (March 30, 1964) (remarks of Senator Humphrey); see also *id.* at 6564 (March 30, 1964) (remarks of Senator Kuchel). No attention was paid in the debates to the mode of review.

[17] It is hardly debatable that, following the 1964 act, remand orders are reviewable by appeal. Such orders were held non-final, hence not reviewable by writ of error in *Railroad Co.* v. *Wiswall*, 23 Wall. 507 (1874), note 19 *infra*. However, this Court's recent decisions in *Local No. 438* v. *Curry*, 371 U. S. 542 (1963), and *Mercantile National Bank* v. *Langdeau*, 371 U. S. 555 (1963), point to broader modern concepts of finality, and the latter case particularly suggests that an order is "final" which sends a litigant for trial into a forum where Congress has given him a specific right

cepted doctrine and history make clear that mandamus is equally available under the "otherwise" clause.

Under the all writs section of the Judicial Code, 28 U. S. C. §1651 (1964), the courts of appeals have power to issue orders in the nature of mandamus[18] in aid of their appellate jurisdiction. Since, pursuant to 28 U. S. C. §1291 (1964), the Court of Appeals for the Fifth Circuit could review final decisions of the District Court for the Northern District of Georgia in these removed criminal actions, Fifth Circuit review "agreeable to the usages and principles of law" (§1651) of interlocutory orders in the cases is allowable, *United States* v. *Smith,* 331 U. S. 469 (1947); *La Buy* v. *Howes Leather Co.,* 352 U. S. 249 (1957); *Platt* v. *Minnesota Mining & Mfg. Co.,* 376 U. S. 240 (1964) (by implication), particularly where the interlocutory order prevents the cases from coming to final judgment in the district court and thus defeats the normal appellate jurisdiction of the court of appeals under §1291. *McClellan* v. *Carland,* 217 U. S. 268 (1910).

"Applications for a mandamus to a subordinate court are warranted by the principles and usages of law in cases

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not to be tried. See also *United States* v. *Wood,* 295 F. 2d 772 (5th Cir. 1961). In view of the extended notion of finality expressed in these decisions, and the explicit statutory specification of "appeal" as a mode of review in the 1964 act, appeal from remand orders in §1443 cases ought now be allowed under the general jurisdictional grant of 28 U. S. C. §1291 (1964).

[18] FED. RULE CIV. PRO. 81(b), formally abolishing the writ of mandamus and providing that all relief previously available by mandamus may be obtained by appropriate action or motion, does not affect the scope of relief in the nature of mandamus which a federal appellate court may give. *La Buy* v. *Howes Leather Co.,* 352 U. S. 249 (1957) (by implication). Indeed, in view of FED. RULE CIV. PRO. 1, the application of Rule 81 to original proceedings in the courts of appeals is questionable.

where the subordinate court, having jurisdiction of a case, refuses to hear and decide the controversy. . . . " *Ex parte Newman*, 14 Wall. 152, 165 (1871) (dictum). See *Insurance Co.* v. *Comstock*, 16 Wall. 258 (1872) (issuing advisory opinion to do service for mandamus). Relying on *Newman* and *Comstock*, this Court in *Railroad Co.* v. *Wiswall*, 23 Wall. 507 (1874), decided that an order of a federal trial court remanding a removed case to the state court was reviewable by mandamus.[19] That ruling has never been questioned in subsequent cases. See *Hoadley* v. *San Francisco*, 94 U. S. 4, 5 (1876); *Babbitt* v. *Clark*, 103 U. S. 606, 610 (1880); *Turner* v. *Farmers' Loan & Trust Co.*, 106 U. S. 552, 555 (1882); *Gay* v. *Ruff*, 292 U. S. 25, 28 n. 3 (1934); *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374, 378 (1937); also *Missouri Pacific Ry. Co.* v. *Fitzgerald*, 160 U. S. 556, 580 (1896); *United States* v. *Rice*, 327 U. S. 742, 749-750 (1946). It is accordingly clear that, but for any question arising from former 28 U. S. C. §1447(d), "the power of the court to issue the mandamus would be undoubted." *In re Pennsylvania Co.*, 137 U. S. 451, 453 (1890). Exception of civil rights removal cases from the review bar of the section therefore makes the writ available.

The availability of an appeal from the remand order does not affect that of the writ. The two remedies are alternatively available under the 1964 amendment. Mandamus is not here invoked to perform a function customarily performed by appeal. Compare *Ex parte Fahey*, 332 U. S. 258

[19] The *Wiswall* case was decided before the creation of the courts of appeals in 1891, at a time when this Court had the same immediate appellate superintendence over the old circuit courts that the courts of appeals now have over the district courts. In *Wiswall* the Court dismissed a writ of error to the circuit court on the ground that the proper remedy was an application to the Court for mandamus.

(1947). Rather, of the remedies, mandamus is the more settled, the more traditional in this use. For that reason, the principle that mandamus "is not to be used as a substitute for appeal," *Schlagenhauf* v. *Holder*, 379 U. S. 104, 110 (1964), has no application. The principle is an aphoristic expression for the related considerations that this Court will not ordinarily permit use of the writ to obtain interlocutory review unauthorized by Congress, see e.g., *Roche* v. *Evaporated Milk Assn.*, 319 U. S. 21 (1943); *Bankers Life and Cas. Co.* v. *Holland*, 346 U. S. 379 (1953), and that the pervasive federal policy against such interlocutory review will only yield in cases of plain abuse of discretion or legal error by a district court, see *Schlagenhauf* v. *Holder*, *supra*; *Platt* v. *Minnesota Mining & Mfg. Co.*, 376 U. S. 240 (1964). Neither of these considerations is involved in the present use of the prerogative writ—the first, because Congress has explicitly authorized interlocutory review of remand orders; the second, for that reason and because, in any event, the present case presents a question of first impression concerning federal jurisdiction turning on construction of an important federal statute, see *Schlagenhauf* v. *Holder*, *supra*; *Van Dusen* v. *Barrack*, 376 U. S. 612, 615 n. 3 (1964). The aphorism has never been thought to mean that in an otherwise fitting case mandamus would not lie for the sole reason that the question sought to be raised by the writ was raisable on an appeal, see *United States Alkali Export Assn.* v. *United States*, 325 U. S. 196 (1945); and an unbroken line of authority supports the fitness of mandamus for the specialized purpose of requiring a lower court to assume a jurisdiction which it has wrongly declined. See pp. 29-30 *supra*.

Nor, since both appeal and mandamus are available modes of review, were these defendants obligated to seek

the latter within the time limited for the former. See *Coppedge* v. *United States*, 369 U. S. 438, 445 n. 10 (1962), where this Court held that a federal criminal defendant's application to a court of appeals for leave to proceed on appeal *in forma pauperis* was timely as an original application to that court notwithstanding the defendant did not within ten days file an available appeal from the district court's denial of such leave. The question of timeliness in application for the writ is governed by principles of laches, see *In re Hohorst*, 150 U. S. 653 (1893); and neither in its motion to dismiss the appeal below (see R. 10-13) nor in its original petition for prerogative writs previously filed in this Court (see Petition in *Georgia* v. *Tuttle*, 377 U. S. 987 (1964)) has Georgia ever asserted facts which would support a finding of laches on the part of these defendants.

2. *The Court of Appeals Might Permissibly Entertain the Present Proceeding as on Petition for Mandamus.*

Defendants have never filed in the court of appeals any paper specifically denominated a petition for mandamus, although in their brief below they urged that the court treat their motion of March 12, 1964 (App. 1a-3a) seeking stay of the district court's remand order, as such a petition. Clearly it would lie within the power of the court of appeals so to treat the motion; liberal treatment would comport with prior practice both of this Court and of the Fifth Circuit. E.g., *Georgia Hardwood Lumber Co.* v. *Compania de Navegacion Transmar, S.A.*, 323 U. S. 334 (1945) (notice of appeal treated as application for allowance of appeal in admiralty in order to save appeal); *Crump* v. *Hill*, 104 F. 2d 36 (5th Cir. 1939) (filing in Court of Appeals of acknowledgment of service of notice of appeal and

designation of record treated as filing of notice of appeal in order to save appeal); *Des Isles* v. *Evans*, 225 F. 2d 235 (5th Cir. 1955) (application for leave to appeal *in forma pauperis* treated as notice of appeal in order to save appeal); *Roth* v. *Bird*, 239 F. 2d 257 (5th Cir. 1956) (same); *O'Neal* v. *United States*, 272 F. 2d 412 (5th Cir. 1959) (appeal bond treated as notice of appeal in order to save appeal); *Carter* v. *Campbell*, 285 F. 2d 68 (5th Cir. 1960) (securing of District Court order transmitting exhibits to Court of Appeals, and filing in Court of Appeals a motion for leave to prosecute appeal on typed record treated as filing notice of appeal in order to save appeal); and for an extreme instance see *Hadjipateras* v. *Pacifica, S.A.*, 290 F. 2d 697 (5th Cir. 1961) (motion in District Court for allowance of appeal in admiralty and motion in Court of Appeals for expedited hearing treated as petitions to the respective courts for allowance of interlocutory appeal) (alternative ground).[20] Treatment of the March 12 motion or of the other appeal papers (see *New York* v. *Galamison*,

[20] The clear weight of federal authority supports the Fifth Circuit decisions cited. E.g., *In re Leigh*, 139 F. 2d 386 (D. C. Cir. 1943) (petition to Court of Appeals for special appeal treated as notice of appeal in order to save appeal); *Societe Internationale Pour Participations Industrielles et Commerciales, S.A.* v. *McGrath*, 180 F. 2d 406 (D. C. Cir. 1950) (same); *The Astorian*, 57 F. 2d 85 (9th Cir. 1932) (petition for libel of review treated as petition for rehearing in order to extend appeal time and save appeal); *Dickey* v. *United States*, 332 F. 2d 773 (9th Cir. 1964) (notice of motion for new trial treated as motion for new trial in order to extend appeal time and save appeal). By contrast, the Seventh Circuit tends to insist on technical perfection. *Hulson* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 289 F. 2d 726 (7th Cir. 1961). But the court below had previously adopted "the more liberal rule" in such matters, *United States* v. *Stromberg*, 227 F. 2d 903, 904 (5th Cir. 1955) (notice of appeal from denial of post-trial motions treated as addressed to underlying judgment as well), as has this Court since, *Foman* v. *Davis*, 371 U. S. 178 (1962) (same).

342 F. 2d 255, 257 (2d Cir. 1965) (dictum)) as petitions for mandamus would be the more justifiable here because, should review be denied on technical grounds, defendants can readily file a second removal petition and return this case to its present posture with all technical defects cured. Cf. *Heflin* v. *United States*, 358 U. S. 415, 418 n. 7 (1959).[21] At the least, then, if this Court concludes that defendants' attempted appeal was untimely, the Court should remand the case to the Fifth Circuit so that that court may exercise its discretion to review the remand order as on petition for a prerogative writ.

C. This Court May Review the Remand Order as on Original Petition for Mandamus.

Finally, it should be noted that this Court need not resolve any issue of the jurisdiction of the court of appeals in order to reach the important substantive question here presented. Under 28 U. S. C. §1651 (1964), the Court at its discretion might treat the case as properly before it within its original jurisdiction to issue a writ of mandamus to the district court without limitation of time. See *Ex parte Peru*, 318 U. S. 578 (1943). In view of the volume

[21] Defendants' counsel would be worse than disingenuous not to concede that their papers were badly styled and that they are now in the graceless posture, as Georgia puts it, of "trying frantically to . . . 'stay in court'" (Br. 29). In February and March, 1964 the manner of obtaining review of a district court remand order was far from clear and, while this does not excuse counsel's technical failures, it does suggest the harshness of visiting irreparable consequences on defendants. Cf. *Reconstruction Finance Corp.* v. *Prudence Securities Advisory Group*, 311 U. S. 579 (1941) (notice of appeal treated as petition to Court of Appeals for leave to appeal where method of appeal was unsettled); *Cutting* v. *Bullerdick*, 178 F. 2d 774 (9th Cir. 1949) (notice of motion for a stay of execution pending posting of a supersedeas bond treated as notice of appeal where manner of a notice of appeal was unsettled).

of litigation pending in the lower federal courts, see Petition for Certiorari, *Anderson* v. *City of Chester*, O. T. 1965, No. 443, and the obvious "public importance" of expeditious construction of the civil rights removal statute, see *Ex parte United States*, 287 U. S. 241 (1932), the exercise of that discretion in this case—already briefed and ripe for argument—would seem appropriate.

II.

Defendants Criminally Prosecuted for Conduct Protected by Title II of the Civil Rights Act of 1964 May Remove Their Prosecutions Under 28 U. S. C. §1443 Without Showing That the State Criminal Statutes Underlying Their Prosecutions Are Facially Unconstitutional or the State Courts Unfair.

Part II of Georgia's brief (Br. 30-50) appears to make two different points. The first involves construction of 28 U. S. C. §1443 (1964): Georgia contends that removal under subsection (1) of that section is not available unless the party seeking to remove is charged under, or otherwise affected by, state legislation unconstitutional on its face (Br. 30, 31-34, 42-43, 46); and that removal under subsection (2) of the section is limited to federal officers and persons acting under their authority (Br. 35-41, 43-46). The second point is one of pleading: Georgia contends that the removal petition was insufficient for lack of detailed factual allegations (Br. 30-31, 34-35), hence did not require hearing (Br. 47-50). Part III of Georgia's brief (Br. 50-54) also makes two points. The first concerns statutory construction: subsection 1443(1) is said not to authorize removal except upon a showing that the state courts will not fairly entertain a petitioner's federal claim (Br. 51-54). The

second questions the court of appeals' construction of *Hamm v. City of Rock Hill*, 379 U. S. 306 (1964), and consequently the propriety of its directions to the district court on remand (Br. 50-51). Defendants will deal with the two points of statutory construction in this Part II of their brief, will deal in Part III *infra* with the sufficiency of their removal petition as a pleading, and will deal in Part IV *infra* with the scope of the court of appeals' remand directions.

Adequate consideration of the questions of construction posed by this case requires a somewhat extended discussion of the legislative and judicial backgrounds of the civil rights removal statute, 28 U. S. C. §1443 (1964). The road of inquiry is long but leads straight to the conclusion that state criminal defendants charged with offenses based on conduct protected by the public accommodations sections of the Civil Rights Act of 1964 may remove their prosecutions to a federal district court on that ground alone, without showing that the state statute under which they are charged is facially unconstitutional, or that the state courts will not fairly hear their federal defense.

A. The Background of 28 U. S. C. §1443

1. *Legislative Background*

Increasingly since the inception of the Government, federal removal jurisdiction has been expanded by Congress[22]

[22] See HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1147-1150 (1953). Before 1887, the requisites for removal jurisdiction were stated independently of those for original federal jurisdiction; since 1887, the statutory scheme has been to authorize removal generally of cases over which the lower federal courts have original jurisdiction and, additionally, to allow removal in special classes of cases particularly affecting the national interest: suits or prosecutions against federal officers, military personnel, persons unable to enforce their equal civil rights in the state courts,

to protect national interests in cases "in which the State tribunals cannot be supposed to be impartial and unbiassed [sic]," [23] for history has increasingly taught the wisdom of Hamilton's insight: "The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes . . . " [24] In the Constitutional Convention Madison pointed out the need for such protection just before he successfully moved the Committee of the Whole to authorize the national legislature to create inferior federal courts.[25]

> Mr. [Madison] observed that unless inferior tribunals were dispersed throughout the Republic with *final* jurisdiction in *many* cases, appeals would be multiplied to a most oppressive degree; that besides, an appeal would not in many cases be a remedy. What was to be done after improper Verdicts in State tribunals obtained under the biased directions of a dependent Judge, or the local prejudices of an undirected jury? To remand the cause for a new trial would answer no purpose. To order a new trial at the supreme bar would oblige the parties to bring up their witnesses, tho' ever so distant from the seat of the Court.

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persons acting under color of authority derived from federal law providing for equal rights or refusing to act inconsistently with such law, the United States (in foreclosure actions), etc. 28 U. S. C. §§1441-1444 (1964); see HART & WECHSLER, *supra*, at 1019-1020.

[23] THE FEDERALIST, No. 80 (Hamilton) (Warner, Philadelphia ed. 1818), at 429.

[24] *Id.*, No. 81, at 439.

[25] 1 FARRAND, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 125 (1911). Mr. Wilson and Mr. Madison moved the matter pursuant to a suggestion of Mr. Dickinson.

> An effective Judiciary establishment commensurate to the legislative authority, was essential. A Government without a proper Executive & Judiciary would be the mere trunk of a body without arms or legs to act or move.[26]

The early Congresses made very sparing use of the power which was thus given them by the Constitution; during nearly three quarters of a century following the Judiciary Act of 1789,[27] they acted largely on the principle "that private litigants must look to the state tribunals in the first instance for vindication of federal claims, subject to limited review by the United States Supreme Court." [28] The federal trial courts were employed only for the limited federal specialties; no general federal question jurisdiction was created.[29] Original civil diversity jurisdiction was given[30] —responding then, as today, to "the possible shortcomings of State justice," particularly the localization of trial in parochial communities where "justice is likely to be impeded by the provincialism of the local judge and jury, the tendency to favor one of their own against an outsider, and the machinations of the local 'court house gang'" [31]—and

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[26] *Id.* at 124.

[27] Act of Sept. 24, 1789, ch. 20, 1 Stat. 73.

[28] HART & WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 727 (1953).

[29] Except by the federalist Act of Feb. 13, 1801, ch. 4, §11, 2 Stat. 89, 92, quickly repealed by the Act of March 8, 1802, ch. 8, 2 Stat. 132.

[30] Act of Sept. 24, 1789, ch. 20, §11, 1 Stat. 78.

[31] ALI STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS, Commentary, General Diversity Jurisdiction, at 41 (Tent. Draft No. 1, 1963).

civil removal jurisdiction was given in three sorts of cases[32] where it was particularly feared that local prejudice might impair national concerns. In criminal cases, however, the federal trial courts were entirely excluded from incursion into state proceedings,[33] section 14 of the Judiciary Act expressly excepted state prisoners from the federal habeas corpus authority.[34]

Experience soon showed, however, the potential of the state criminal process for destruction of vital national concerns. Congress responded with limited grants of federal trial court jurisdiction, in removal and habeas corpus. In 1815, confronted by New England's resistance to the War of 1812,[35] Congress in a customs act allowed removal of suits or criminal prosecutions

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[32] The Act of Sept. 24, 1789, ch. 20, §12, 1 Stat. 79, authorized removal in the following classes of cases where more than $500 was in dispute: suits by a citizen of the forum state against an outstater; suits between citizens of the same state in which the title to land was disputed and the removing party set up an outstate land grant against his opponent's land grant from the forum state; suits against an alien. The first two classes were specifically described by Hamilton as situations "in which the state tribunals cannot be supposed to be impartial," *The Federalist* No. 80, at 432 (Warner ed. 181). Madison speaking of state courts in the Virginia convention, amply covered the third: "We well know, sir, that foreigners cannot get justice done them in these courts. . . ." 3 *Elliot's Debates* 583 (1836).

[33] The jealousy of the States as regards their criminal process is indicated by the furor aroused by Supreme Court assumption of jurisdiction to review federal questions in state criminal cases as late as 1821. *Cohens* v. *Virginia*, 19 U. S. (6 Wheat.) 264 (1821); see 1 WARREN, THE SUPREME COURT IN UNITED STATES HISTORY 547-59 (rev. ed. 1932).

[34] Except where it was necessary to bring them into court to testify. Act of Sept. 24, 1789, ch. 20, §14, 1 Stat. 81.

[35] See 1 Morison & Commager, *Growth of the American Republic* 426-29 (4th ed. 1950).

> against any collector, naval officer, surveyor, inspector, or any other officer, civil or military, or any other person aiding or assisting, agreeable to the provisions of this act, or under colour thereof, for any thing done, or omitted to be done, as an officer of the customs, or for any thing done by virtue of this act or under colour thereof.[36]

In 1833, confronted by South Carolina's opposition to the tariff,[37] Congress enacted the famed Force Act, giving the President extensive power to use the military forces of the United States to protect federal customs officers and suppress resistance to the customs laws;[38] extending the civil jurisdiction of the federal courts to all cases arising under the revenue laws;[39] authorizing removal of any suit or prosecution

> against any officer of the United States, or other person, for or on account of any act done under the revenue laws of the United States, or under colour thereof, or for or on account of any right, authority, or title, set up or claimed by such officer, or other person under any such law of the United States;[40]

and adding to the federal habeas corpus jurisdiction

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[36] Act of Feb. 4, 1815, ch. 31, §8, 3 Stat. 198; Act of March 3, 1815, ch. 93, §6, 3 Stat. 233. Both enactments were temporary legislation. Their removal provisions were extended four years by Act of March 3, 1817, ch. 109, §2, 3 Stat. 396.

[37] See 1 Morison & Commager, *op. cit., supra,* note 35, 475-85.

[38] Act of March 2, 1833, ch. 57, §§1, 5, 4 Stat. 632, 634.

[39] Act of March 2, 1833, ch. 57, §2, 4 Stat. 632.

[40] Act of March 2, 1833, ch. 57, §3, 4 Stat. 633. Section 2 of the act envisioned that under certain circumstances private individuals, as well as federal officers, might take or hold property pursuant to the revenue laws.

> power to grant writs of habeas corpus in all cases of a prisoner or prisoners, in jail or confinement, where he or they shall be committed or confined on, or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process, or decree, of any judge or court thereof.[41]

The act's evident purpose was to exclude state court jurisdiction in cases affecting the tariff,[42] and to give the federal

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[41] Act of March 2, 1833, ch. 57, §7, 4 Stat. 634.

[42] This purpose is apparent as respects the removal jurisdiction, which was sustained in *Tennessee* v. *Davis*, 100 U. S. 257 (1880), against constitutional complaints that "it is an invasion of the sovereignty of a State to withdraw from its courts into the courts of the general government the trial of prosecutions for alleged offenses against the criminal laws of a State." *Id.* at 266. The revenue officer removal provisions were continued in successive judiciary acts until 1948, when they were extended to encompass all federal officers and persons acting under them. 28 U. S. C. §1442(a)(1) (1964). As for the habeas corpus grant, continued in substance in present 28 U. S. C. §2241(c)(2) (1964), this has always been construed as directing the federal courts to entertain petitions for the writ in advance of state trial in cases where federal officers are prosecuted, see the authorities collected in the briefs and opinion in *In re Neagle*, 135 U. S. 1 (1890); e.g., *Reed* v. *Madden*, 87 F. 2d 846 (8th Cir. 1937); *In re Fair*, 100 Fed. 149 (C. C. D. Neb. 1900); *United States ex rel. Flynn* v. *Fuelhart*, 106 Fed. 911 (C. C. W. D. Pa. 1901); *United States* v. *Lipsett*, 156 Fed. 65 (W. D. Mich. 1907); *Ex parte Warner*, 21 F. 2d 542 (N. D. Okla. 1927); *Brown* v. *Cain*, 56 F. Supp. 56 (E. D. Pa. 1944); *Lima* v. *Lawler*, 63 F. Supp. 446 (E. D. Va. 1945), or where private citizens acting under federal officers are prosecuted, *Anderson* v. *Elliott*, 101 Fed. 609 (4th Cir. 1900), dism'd 22 S. Ct. 930 (1902); *West Virginia* v. *Laing*, 133 Fed. 887 (4th Cir. 1904). Discharge of federal officers has sometimes been denied after evidentiary hearing where the evidence did not preponderantly show that the officer was acting within the scope of his federal authority. *United States ex rel. Drury* v. *Lewis*, 200 U. S. (1906); *Birsch* v. *Tumbleson*, 31 F. 2d 811 (4th Cir. 1929); *Castle* v. *Lewis*, 254 Fed. 917 (8th Cir. 1918); *Ex parte Tilden*, 218 Fed. 920 (D. Ida.

courts plenary power to enforce the tariff against concerted state resistance, including state judicial resistance: it was "apparent that the constitution of the courts in South Carolina makes it necessary to give the revenue officers the right to sue in the federal courts." [43]

The federal habeas corpus jurisdiction was extended again in 1842 to authorize release of foreign nationals and domiciliaries held under state law or process on account of any act claimed to have been done under color of foreign authority depending on the law of nations.[44] This extension was occasioned by the *McLeod* case,[45] in which the New York courts nearly provoked an international incident by refusing to relinquish jurisdiction over a British subject held for murder who claimed that the acts with which he was charged were done under British authority. McLeod was acquitted at his trial, but the need for an expeditious federal remedy to short-cut the state court process in such cases was strongly felt: "If satisfied of the existence in fact and validity in law of the [plea in] bar, the federal jurisdiction will have the power of administering prompt

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1914). The evidentiary standard is discussed in *Brown* v. *Cain* and *Lima* v. *Lawler, supra.* These cases do not reflect hesitation to use the federal writ to abort state trial in any case in which the interests of the federal government are affected; they indicate only that, in each case, the federal interest was not sufficiently shown on the facts. See *In re Matthews,* 122 Fed. 248 (E. D. Ky. 1902), and particularly *In re Miller,* 42 Fed. 307 (E. D. S. C. 1890); cf. *Ex parte United States ex rel. Anderson,* 67 F. Supp. 374 (S. D. Fla. 1946), decided on same grounds without a hearing.

[43] 9 *Cong. Deb.* 260 (Jan. 29, 1833). The speaker is Senator Wilkins, who reported the bill, *id.* at 150 (Jan. 21, 1833), and managed it in the Senate, *id.* at 246 (Jan. 28, 1833). See also, *id.* at 329-32 (Feb. 2, 1833) (remarks of Senator Frelinghuysen).

[44] Act of August 29, 1842, ch. 257, 5 Stat. 539.

[45] See *People* v. *McLeod,* 25 Wend. 482 (Sup. Ct. N. Y. 1841).

relief." [46] Again, as in 1815 and 1833, the scope of federal intrusion was narrow.

But the Civil War and its aftermath changed the congressional temper sharply. During and after the War, Congress multiplied the uses of the federal courts and, in particular, their uses to anticipate the state criminal process. By the Habeas Corpus Suspension Act of 1863[47] it immunized from state civil and criminal liability persons making searches, seizures, arrests and imprisonments under presidential orders during the existence of the rebellion; to insure this protection, it provided in section 5 of the act for removal of all suits and criminal prosecutions

> against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress.[48]

The debates preceding passage of the act reflected congressional concern that federal officers could not receive a fair trial in hostile state courts, and that the appellate supervision of the Supreme Court of the United States would

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[46] Senator Berrien, at CONG. GLOBE, 27th Cong., 2d Sess. 444 (4/26/42). Mr. Berrien, chairman of the Senate Judiciary Committee, reported and managed the bill which became the act. *Id.* at 443. See the discussion of the act in *In re Neagle*, 135 U. S. 1, 71-72, 74 (1890).

[47] Act of March 3, 1863, ch. 81, 12 Stat. 755.

[48] 12 Stat. 756.

be inadequate to rectify the decisions of lower state tribunals having the power to find the facts.[49]

In 1864 and 1866,[50] Congress also extended the customs-officer removal provisions of the 1833 Force Act to cover civil and criminal cases involving internal revenue collection. In their final 1866 form, these provisions authorized federal removal of suits and prosecutions "against any officer of the United States appointed under or acting by authority of [the revenue laws] . . . or against any person acting under or by authority of any such officer on account of any act done under color of his office," or against persons claiming title from such officers, where the cause concerned the property and affected the validity of the revenue laws.

During the first months of the Thirty-Ninth Congress, Union military commanders in the defeated South transferred from the state courts to national military tribunals civil and criminal jurisdiction over cases involving Union

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[49] CONG. GLOBE, 37th Cong., 3d Sess. 534-38 (Jan. 27, 1863).

[50] Act of March 7, 1864, ch. 20, §9, 13 Stat. 17; Act of June 30, 1864, ch. 173, §50, 13 Stat. 241; Act of July 13, 1866, ch. 184, 14 Stat. 98. By the 1866 act Congress (a) generally amended the revenue provisions of the act of June 30, 1864; (b) in §67, 14 Stat. 171, authorized removal of any civil or criminal action

> against any officer of the United States appointed under or acting by authority of [the Act of June 30, 1864, and amendments thereto] . . . or against any person acting under or by authority of any such officer on account of any act done under color of his office, or against any person holding property or estate by title derived from any such officer, concerning such property or estate, and affecting the validity of [the revenue laws] . . . ;

and (c) in §68, 14 Stat. 172, repealed the removal provisions (§50) of the Act of June 30, 1864, and provided for the remand to the state courts of all pending removed cases which were not removable under the new 1866 removal provisions.

soldiers, loyalists and Negroes.[51] Recognizing the wisdom of this transfer, and intensely aware of the hostility and anti-Union prejudice of the Southern state courts,[52] whose process was being used to harass the unionists and freedmen,[53] that Congress took four important steps to curb the state courts.

First, by the Amendatory Freedmen's Bureau Act,[54] it approved and expressly authorized the supersession of

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[51] See General Sickles' order, set out at CONG. GLOBE, 39th Cong., 1st Sess. 1834 (April 7, 1866), providing that military courts "shall have, as against any and all civil courts, exclusive jurisdiction in all cases where freedmen and other persons of color are directly or indirectly concerned, until such persons shall be admitted to the State courts as parties and witnesses with the same rights and remedies accorded to all other persons," unless the Negroes concerned filed a written stipulation submitting the proceeding to the state court. *Cf. id.* at 320 (Jan. 19, 1866) (General Grant's order).

[52] *E.g., id.* at 1526 (March 20, 1866) (remarks of Representative McKee, of Kentucky), 1527 (remarks of Representatives Garfield and Smith, of Kentucky), 1529 (remarks of Representative Cook) 2054, 2063 (April 20, 1866) (remarks of Senator Clark). Clark pointed out that hostile state legislatures could not be looked to for redress of the discriminations practiced by hostile state judges. *Id.* at 2054. The only relief for the Union men was access to the federal courts: "There is where they are most likely to have their rights protected. There is where local prejudices are frowned down." *Id.* at 1526 (March 20, 1866) (remarks of Representative McKee, of Kentucky); see *id.* at 1528 (remarks of Representative Smith, of Kentucky), 1529-30 (remarks of Representative Cook); *cf. id.* at 1387 (March 14, 1866) (remarks of Representative Cook). See also the debates on the amendatory freedmen's bureau bills: *id.* at 320 (Jan. 19, 1866) (remarks of Senator Trumbull), 339 (Jan. 22, 1866) (remarks of Senator Cresswell), 744 (Feb. 8, 1866) (remarks of Senator Sherman), 941 (Feb. 20, 1866) (remarks of Senator Trumbull), 657 (Feb. 5, 1866) (remarks of Representative Eliot), 2774-77 (May 23, 1866) (remarks of Representative Eliot).

[53] See text and notes at notes 61-67, *infra*.

[54] Act of July 16, 1866, ch. 200, §14, 14 Stat. 176. Concerning supersession of state civil and criminal jurisdiction by military

state courts by Union military tribunals throughout the South until the rebellious States were restored to order and their representatives readmitted to Congress.[55] In this, the

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tribunals under the act, see DUNNING, ESSAYS ON THE CIVIL WAR AND RECONSTRUCTION 147, 156-63 (1898).

[55] Section 14 of the Amendatory Freedmen's Bureau Act, note 54 *supra*, provided that in every State where "the ordinary course of judicial proceedings has been interrupted by the rebellion," or where the State's "constitutional relations to the government have been practically discontinued by the rebellion," certain enumerated rights—an enumeration substantially identical to that of §1 of the Civil Rights Act—should be secured to all citizens without respect to race or color. Where the course of judicial proceedings had been interrupted, the President through the Freedmen's Bureau was to "extend military protection and have military jurisdiction over all cases and questions concerning the free enjoyment of such immunities and rights," this jurisdiction to cease in every State when the state and federal courts therein were no longer disturbed in the peaceable course of justice, and after the State was restored to its constitutional relations and its representatives seated in Congress. The jurisdiction appears of slightly different scope than that given by the first amendatory freedmen's bureau bill, S. 60 of the Thirty-ninth Congress, a companion bill to the civil rights bill, *infra*, which failed of passage over President Johnson's veto. The predecessor bill authorized military jurisdiction over all cases affecting the Negroes, but only when in a State the ordinary course of judicial proceedings had been interrupted by the rebellion *and* the same enumerated rights were discriminatorily denied to Negroes; this jurisdiction to cease "whenever the discrimination on account of which it is conferred ceases," and in any event so soon as the state and federal courts were no longer disturbed and the State's constitutional relations were restored.

In debate on the first bill, Senator Trumbull, who introduced, reported and managed it, CONG. GLOBE, 39th Cong., 1st Sess. 129 (Jan. 5, 1866), 184 (Jan. 11, 1866), 209 (Jan. 12, 1866), resisted attacks on the jurisdiction by repeated insistence that the bill operated only where the civil courts were overthrown. *Id.* at 320-22 (Jan. 19, 1866), 347 (Jan. 22, 1866), 937-38 (Feb. 20, 1866). In this he manifested no deference to the state courts, for the principal attack was upon the institution of military tribunals, as distinguished from federal civil tribunals, see, *e.g.*, the President's veto messages set out *id.* at 915-17 (Feb. 19, 1866), 3849-50 (July 16, 1866), and it was to this attack that Trumbull replied. See *id.* at

Thirty-Ninth Congress—like the military commanders before it—intended that nationally responsible courts should sit at the trial level, so that the unionists and freedmen might be protected not only against explicitly discriminatory Southern state statutes, but also against Southern state judicial maladministration of statute law apparently fair on its face.[56]

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322 (Jan. 19, 1866), 937-38 (Feb. 20, 1866). He explained that the civil rights bill applied, and could be enforced, only in parts of the country where the civil courts were functioning; that the amendatory freedmen's bureau bill applied only where they were not. *Id.* at 3412 (June 26, 1866) (debate on the second bill). See also *id.* at 2773 (May 23, 1866) (remarks of Representative Eliot, who reported and managed the second bill, *id.* at 2743 (May 22, 1866), 2772 (May 23, 1866)). And in a speech concerned with both the civil rights and first amendatory freedmen's bureau bills, Trumbull appears to view them as having substantially similar scope. *Id.* at 322-23 (Jan. 19, 1866).

[56] Particularly significant is an order of General Terry in Virginia, March 12, 1866, set out at CONG. GLOBE, 39th Cong., 1st Sess. 1834 (April 7, 1866). The Virginia legislature on February 28, 1866, had passed a statute providing that all laws respecting crimes, punishments, and criminal proceedings should apply equally to Negroes and whites, and that Negroes should be competent witnesses in all cases in which Negroes were involved. General Terry's order thereupon restored to the civil courts the jurisdiction theretofore exercised by the military tribunals in all criminal matters affecting the freedmen, but provided an elaborate system of protection to assure that the Virginia laws would be fairly administered as they were written. Under part III of the order, assistant superintendents of the Freedmen's Bureau were required to attend in person all criminal trials or preliminary hearings in which Negroes were parties or witnesses. Under part IV, the duties of the assistants were spelled out: they were not to interfere with the court, or act as attorneys, although they might make friendly suggestions to the Negroes concerned. "They will, however, make immediate report of any instance of oppression or injustice against a colored party, whether prosecutor or defendant, and also in case the evidence of colored persons should be improperly rejected or neglected." Under part V, the assistants were to examine and report if in any instance a prosecutor, magistrate, or grand jury had refused justice to a colored person by improperly neglecting

Second, the same Congress substantially amended the removal procedures under the Habeas Corpus Suspension Act of 1863, *supra,* in order to prevent their obstruction by the state courts. The Act of May 11, 1866, chapter 80,[57] facilitated removal practice;[58] the Act of February 5, 1867,

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a complaint or refusing to receive a sworn information, so that by reason of partiality a trial or prosecution was avoided. Part VI required the assistants to make monthly detailed reports concerning the effect of the order on the interests of Negroes, "whether they have been treated with impartiality and fairness, and the law respecting their testimony carried out in good faith or otherwise." General Grant's order of January 12, 1866, had directed the commanders to protect Negroes from prosecution in the rebel States "charged with offenses for which white persons are not prosecuted or punished in the same manner and degree." *Id.* at 320 (Jan. 19, 1866). Senator Trumbull, questioned concerning Grant's order, said that he did "indorse the order and every word in it." *Ibid.*

[57] 14 Stat. 46.

[58] Section 1 of the Act of May 11, 1866, declared that any act or omission under authorized military order came within the purview of the sections of the act of 1863 which made acts or omissions under presidential order immune from civil and criminal liability and allowed removal to the federal courts by defendants charged in state courts in respect of such acts. 14 Stat. 46. The section was responsive to state court decisions requiring that a defendant produce an order from the President himself in order to come within the 1863 act. CONG. GLOBE, 39th Cong., 1st Sess. 1387 (March 14, 1866) (remarks of Representative Cook, who reported the bill, *id.* at 1368 (March 13, 1866), and was its floor manager, *id.* at 1387 (March 14, 1866)). Section 2 of the 1866 act specified the means by which the millitary order relied on might be proved. Section 3 extended the time for removal up to the point of empaneling a jury in the state court, and eliminated the 1863 requirement of a removal bond. Section 4 directed that upon the filing of a proper removal petition all state proceedings should cease, and that any state court proceedings after removal should be void and all parties, judges, officers, or other persons prosecuting such proceedings should be liable for damages and double costs to the removing party. 14 Stat. 46. Section 5 directed the clerk of the state court to furnish copies of the state record to a party seeking to remove, and permitted that party to docket the removed case

chapter 27,[59] authorized the issuance of writs of habeas corpus *cum causa* by the federal courts to bring before them any imprisoned defendants whose cases had been removed.[60] The debates on the first of these remedial enactments are particularly revealing: they demonstrate beyond peradventure Congress' distrust of, and unwillingness to leave the vindication of federal interests to, the state judiciary. "Now, it so happens, as the rebellion is passing away, as the rebel soldiers and officers are returning to their homes, that I may say thousands of suits are springing up all through the land, especially where the rebellion prevailed, against the loyal men of the country

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in the federal court without attaching the state record in case of refusal or neglect by the state court clerk. 14 Stat. 46-47. These latter provisions were intended to alter procedural requirements upon which the state courts had seized to obstruct removal. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1387-88 (March 14, 1866) (remarks of Representative Cook), 2054 (remarks of Senator Clark, who reported the bill, *id.* at 1753 (April 4, 1866), and was its floor manager, *id.* at 1880 (April 11, 1866)).

[59] 14 Stat. 385.

[60] The act was reported by the Judiciary Committee in each house. CONG. GLOBE, 39th Cong., 1st Sess. 4096 (July 24, 1866) (House), 4116 (Senate). Its purpose was to take from state custody defendants whose cases had been removed into the federal courts, *id.* at 4096 (July 25, 1866) (remarks of Representative Wilson, who reported the bill and was its floor manager, *ibid.*); CONG. GLOBE, 39th Cong., 2d Sess. 729 (Jan. 25, 1867) (remarks of Senator Trumbull, chairman of the Judiciary Committee, who reported the bill, CONG. GLOBE, 39th Cong., 1st Sess. 4116 (July 24, 1866), and was its floor manager, CONG. GLOBE, 39th Cong., 2d Sess. 729 (Jan. 25, 1867)), and thereby to permit the federal court to determine the validity of the defendant's detention under arrest, *ibid.* (remarks of Senator Johnson).

The civil rights removal provisions of the Act of April 9, 1866, ch. 31, §3, 14 Stat. 27, *infra*, adopted the procedures of the 1863 removal sections "and all acts amendatory thereof."

who endeavored to put the rebellion down."[61] "[S]uits are springing up from one end to the other; and these rebel courts are ready to decide against your Union men and acquit the rebel soldier."[62] "A great many vexatious suits have been brought, and they are still pending, and instances have been known—they exist now—where Federal officers have been pushed very hard and put to great hardships and expense, and sometimes convicted of crime, for doing things which were right in the line of duty, and which they were ordered to do and which they could not refuse to do."[63] In Kentucky, "they are harassing, annoying, and

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[61] CONG. GLOBE, 39th Cong., 1st Sess. 2021 (April 18, 1866) (remarks of Senator Clark). Senator Clark reported and managed the bill which became the act. Note 58 *supra*.

The oppressive volume of state litigation against Union men was frequently noted in debate. *E.g.*, CONG. GLOBE, 39th Cong., 1st Sess. 1880 (April 11, 1866) (remarks of Senator Clark), 1983 (April 17, 1866) (remarks of Senator Trumbull, Chairman of the Judiciary Committee): It was said that there were over 3000 cases pending in Kentucky alone. *Id.* at 1526, 1529 (March 20, 1866) (remarks of Representative McKee, of Kentucky), 1983 (April 17, 1866) (remarks of Senator Clark), 2021 (April 18, 1866) (remarks of Senator Clark), 2054 (April 20, 1866) (remarks of Senator Wilson).

[62] *Id.* at 2021 (April 18, 1866) (remarks of Senator Clark).

[63] *Id.* at 1880 (April 11, 1866) (remarks of Senator Clark). Recognition that the cost of defending suits and prosecution might itself be ruinous to defendant Union men found strong expression in the comments of Senators Edmunds, *id.* at 2063, 2064 (April 20, 1866), and Howe, *id.* at 2064, in debate of an amendment offered by Edmunds providing that the Secretary of War should defend all actions within the scope of the bill at government expense, and should indemnify the individual defendant for damages, costs, fines and expenses. The amendment was opposed on the ground that it would overburden the Government's financial resources, encourage litigation, encourage collusive actions, result in larger jury verdicts in damage actions, and that defendants could be adequately protected by private indemnifying bills. Both Edmunds' amendment and one by Howe providing for government defense of removed actions, were defeated. *Id.* at 2064-66. Apart from questions of expense, the injury to state-court defendants resulting from delay

even driving out of the State the men who stood true to the flag by suits under the legislation and judiciary rulings of Kentucky. There no protection is guaranteed to a Fed-

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in the vindication of their federal rights was pointed up by the debate between Senators Doolittle and Hendricks, who opposed the provision making state judges civilly liable for proceeding after removal of a cause to the federal court, and Senators Stewart and Clark, who supported it. Senator Doolittle said that it should not be presumed state judges would flout the federal removal statute. Senator Stewart asked, in effect, what relief there was for an indicted defendant if the state court did flout removal, pointing out that a state judge could force an indictment to trial even without the cooperation of the state prosecutor.

MR. HENDRICKS. The Senator as a lawyer knows that this will be the effect of it: if the application takes away the jurisdiction of the State courts then the remedy, of course, if the plaintiff persists in the case, is in the appellate courts, and finally, on an appeal, in the Supreme Court of the United States, inasmuch as the validity of this law, an act of Congress, would be in question.

MR. STEWART. But suppose the judge goes on and convicts the man and sends him to the penitentiary, he must lie there until the case can be heard in the Supreme Court, three or four years hence.

MR. DOOLITTLE. How can he send him to the penitentiary? No officer is allowed to do it. Will the judge put him there himself?

MR. STEWART. The judge can order the officer to put him there.

MR. DOOLITTLE. What if he does if the officer cannot put him there? If every officer to execute a decree of the court is made responsible, how can the judge do it?

MR. STEWART. The judge has jurisdiction over the officer, and he can order him to do it, and if he does not do it the judge can call upon the power of the State if he has jurisdiction.

MR. CLARK. I desire to make but one suggestion in answer to the Senator from Wisconsin, and that is one of fact. He says if it were necessary that these judges should be proceeded against he would not object. I hold in my hand a communication from a member of the other House from Kentucky, in which he says that all the judicial districts of Kentucky, with the exception of one, are in the hands of sympathizing judges.

(footnote continued on following page)

eral soldier." [64] "[I]n another county of that State the grand jury indicted every Union judge, sheriff, and clerk of the election of August, 1865. In addition to that every loyal man who had been in the Army and had, under the order of his superior officer, taken a horse, was indicted." [65] Discrimination against the Union men "is the rule in Kentucky, except in one solitary district, and the Legislature at its last session inaugurated means of removing that judge, simply because he dared to carry out this act of the Federal Congress [the 1863 removal statute]." [66] "There must be some way of remedying this crying evil, and these men who have been engaged in the defense of the country cannot be permitted to be persecuted in this sort of way. Their life becomes hardly worth having, if, after having driven the rebels out of their country and subdued them, those rebels are to be permitted to return and harass them from morning until night and from night till morning, and make their life a curse for that very defense which they have given your country." [67]

> They entirely disregard the act to which this is an amendment. They refuse to allow the transfer, and proceed against these men as if nothing had taken place. Here is not the assumption that these judges will not do this; here is the fact that they do not do it, and it is necessary that these men should be protected.

Id. at 2063 (April 20, 1866). Senators Stewart and Clark prevailed in the vote on an amendment seeking to strike the provision making the state judges liable. *Ibid.*

[64] *Id.* at 1526 (March 20, 1866) (remarks of Representative McKee, of Kentucky).

[65] *Id.* at 1527 (remarks of Representative Smith, of Kentucky). See *id.* at 1526 (remarks of Representative McKee, of Kentucky).

[66] *Id.* at 1526; see *id.* at 2063 (April 20, 1866) (remarks of Senator Clark).

[67] *Id.* at 2054.

Third, the Thirty-Ninth Congress extended the federal habeas corpus jurisdiction to "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States . . .,"[68] made elaborate provision for summary hearing and summary disposition by the federal judges, and provided that:

> pending such proceedings or appeal, and until final judgment be rendered therein, and after final judgment of discharge in the same, any proceeding against such person so alleged to be restrained of his or her liberty in any State court, or by or under the authority of any State, for any matter or thing so heard and determined, or in process of being heard and determined, under and by virtue of such writ of habeas corpus, shall be deemed null and void.[69]

This statute was designed "to enlarge the privilege of the writ of *hobeas* [sic] *corpus,* and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred upon them,"[70] to give

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[68] Act of February 5, 1867, ch. 28, 14 Stat. 385.

[69] Act of February 5, 1867, ch. 28, §1, 14 Stat. 386. The successor to this provision is present 28 U. S. C. §2251 (1964), which authorizes any federal justice or judge before whom a habeas corpus proceeding is pending, to "stay any proceeding against the person detained in any State court or by or under the authority of any State for any matter involved in the habeas corpus proceeding," before judgment, pending appeal, or after final judgment of discharge in the habeas case. State proceedings after granting of a stay are declared void, but if no stay is granted state proceedings are "as valid as if no habeas corpus proceedings or appeal were pending."

[70] Cong. Globe, 39th Cong., 1st Sess. 4151 (July 25, 1866) (remarks of Representative Lawrence, who reported the bill and was its manager in the House).

any person "held under a State law in violation of the Constitution and laws of the United States . . . recourse to United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States." [71] It was "legislation . . . of the most comprehensive character [bringing] . . . within the *habeas corpus* jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties, or laws. It is impossible to widen this jurisdiction." [72] Recent exhaustive study of the history of the 1867 habeas corpus statute confirms that its purpose was to give a summary and imperious federal judicial procedure for the pretrial abortion of state criminal proceedings,[73] and thoroughly supports this Court's observation that "Congress seems to have had no thought . . . that a state prisoner should abide state court determination of his constitutional defense—the necessary predicate of direct review by [the Supreme Court] . . .—before resorting to federal habeas corpus. Rather, a remedy almost in the nature of *removal* from the state to the federal courts of state prisoners' constitutional contentions seems to have been envisaged." *Fay* v. *Noia*, 372 U. S. 391, 416 (1963). See also, *In re Neagle*, 135 U. S. 1 (1890).

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[71] *Id.* at 4229 (July 27, 1866) (remarks of Senator Trumbull, Chairman of the Judiciary Committee, who reported the bill and was its manager in the Senate, *id.* at 4228).

[72] *Ex parte McCardle*, 73 U. S. (6 Wall.) 318, 325-26 (1868).

[73] Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965). This article is concerned with the federal civil rights removal jurisdiction as well as with federal habeas corpus power to anticipate state criminal trials. The historical materials and some of the arguments in this brief are supported by the article.

Fourth, and most significant, on April 9, 1866, Congress enacted the first major civil rights act.[74] Its third section, the ancestor of the present 28 U. S. C. §1443 (1958), on which defendants rely to sustain removal, provided:

> Sec. 3. *And be it further enacted,* That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedman and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. The jurisdiction in civil and criminal matters hereby conferred on the district and

[74] Act of April 9, 1866, ch. 31, 14 Stat. 27.

> circuit courts of the United States shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offences against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of the cause, civil or criminal, is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern said courts in the trial and disposition of such cause, and, if of a criminal nature, in the infliction of punishment on the party found guilty.[75]

The purpose of this 1866 act—"An Act to protect all Persons in the United States in their Civil Rights and to furnish the Means of their Vindication"—was to upset the *Dred Scott* decision[76] by declaring the Negroes citizens, to establish as an incident of that citizenship "the same right" to contract, hold property, etc., and "to full and equal benefit of all laws and proceedings for the security of person and property" as enjoyed by whites (section 1),[77]

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[75] Act of April 9, 1866, ch. 31, §3, 14 Stat. 27.

[76] *Scott* v. *Sandford*, 60 U. S. (19 How.) 393 (1857).

[77] Act of April 9, 1866, ch. 31, §1, 14 Stat. 27, provided:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory

to deter by criminal penalties the deprivation of that "right" (section 2),[78] and to give the Negroes access to federal courts for protection of the right (section 3).[79] The structure of section 3 was: (1) to create original federal jurisdiction in the case of persons who were denied or could not enforce their §1 rights in the state courts; (2) to create removal jurisdiction in cases where any "such person" was sued or prosecuted in a state court; and (3) to create additional removal jurisdiction over suits or prosecutions against persons on account of alleged wrongs committed under color of the 1866 act or the Freedmen's Bureau Acts. Little appears in the legislative history, however, that is helpful in precise construction of any of these jurisdictional grants.[80] Since the basic substantive right given by

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in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

[78] Act of April 9, 1866, ch. 31, §2, 14 Stat. 27, made it criminal for any person, acting under color of law, to subject another to deprivation of any right secured or protected by the act (see §1, note 77, *supra*), or to different punishments, pains, or penalties by reason of race, color, or previous servitude. The section is the forebear of present 18 U. S. C. §242 (1964).

[79] Act of April 9, 1866, ch. 31, §3, 14 Stat. 27.

[80] Except for the words which now appear as the last clause of 28 U. S. C. §1443(2) (1964), allowing removal of actions or prosecutions "for refusing to do any act on the ground that it would be inconsistent with [federal] . . . law [providing for equal civil rights]."

The language "or for refusing to do any act on the ground that it would be inconsistent with this act" was added to the Senate bill by a House amendment. CONG. GLOBE, 39th Cong., 1st Sess., 1366

section 1 of the act was a right of equal treatment under state laws and proceedings, it was an obvious shorthand description of the scope of section 3 to say that it covered "the cases of persons who are discriminated against by State laws or customs," [81] persons "whose equal civil rights are denied . . . in the State courts," [82]—and these were the expressions used by Senator Trumbull, who more than any other one man was the guiding force behind the Civil Rights Act,[83] and who gave the only systematic exposition of its judiciary provisions found in the debates.[84] In the con-

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(March 13, 1866); see *id.*, at 1413 (March 15, 1866). Compare *id.* at 211 (Jan. 12, 1866) (original Senate bill). The purpose of the amendment was stated by Representative Wilson, House Judiciary Committee chairman and floor manager of the bill, in reporting it from his committee, as follows:

> Mr. Wilson, of Iowa.
>
> I will state that this amendment is intended to enable State officers, who shall refuse to enforce State laws discriminating in reference to these rights on account of race or color, to remove their cases to the United States courts when prosecuted for refusing to enforce those laws . . .

Id. at 1367 (March 13, 1866). There was no other pertinent discussion of the provision.

[81] *Id.* at 475 (Jan. 29, 1866) (remarks of Senator Trumbull).

[82] *Ibid.*

[83] Senator Trumbull, who was Chairman of the Judiciary Committee, introduced the bill (S. 61), and had it referred to his committee. *Id.* at 129 (Jan. 5, 1866). He reported the bill from committee, *id.* at 184 (Jan. 11, 1866), and managed it on the Senate floor, see *id.* at 474 (Jan. 29, 1866). Throughout the debates he played a leading role, fully commensurate with his moral and political ascendancy over the Thirty-Ninth Congress.

[84] See Senator Trumbull's key speech urging the bill's passage over veto, CONG. GLOBE, 39th Cong., 1st Sess. 1759 (April 4, 1866):

> The President objects to the third section of the bill . . . [H]e insists [that it] gives jurisdiction to all cases affecting persons discriminated against, as provided in the first and

text of Congress' concern with the *substantive* question of denials of equality, this language plainly does not mean that the removal jurisdiction depended upon a showing of actual denial or discrimination by the state courts: the very text of the statute reaches prosecutions both against

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second sections of the bill; and by a strained construction the President seeks to divest State courts, not only of jurisdiction of the particular case where a party is discriminated against, but of all cases affecting him or which might affect him. This is not the meaning of the section. I have already shown, in commenting on the second section of the bill, that no person is liable to its penalties except the one who does an act which is made penal; that is, deprives another of some right that he is entitled to, or subjects him to some punishment that he ought not to bear.

So in reference to this third section, the jurisdiction is given to the Federal courts of a case affecting the person that is discriminated against. Now, he is not necessarily discriminated against, because there may be a custom in the community discriminating against him, nor because a legislature may have passed a statute discriminating against him; that statute is of no validity if it comes in conflict with a statute of the United States; and it is not to be presumed that any judge of a State court would hold that a statute of a State discriminating against a person on account of color was valid when there was a statute of the United States with which it was in direct conflict, and the case would not therefore rise in which a party was discriminated against until it was tested, and then if the discrimination was held valid he would have a right to remove it to a Federal court—or, if undertaking to enforce his right in a State court he was denied that right, then he could go into the Federal court; but it by no means follows that every person would have a right in the first instance to go to the Federal court because there was on the statute-book of the State a law discriminating against him, presumption being that the judge of the court when he came to act upon the case, would, in obedience to the paramount law of the United States, hold the State statute to be invalid.

If it be necessary in order to protect the freedmen in his rights that he should have authority to go into the Federal courts in all cases where a custom prevails in a State, or where there is a statute-law of the State discriminating against him,

persons "who are denied" and those who "cannot enforce" their rights in the state tribunals. In any event, it is plain that Trumbull was summarizing only part of the jurisdiction granted by section 3: the jurisdiction under the clauses affecting persons "who are denied or cannot enforce" their federal claims (now 28 U. S. C. §1443(1) (1964)).[85] The jurisdiction over persons acting "by virtue or under color of authority" of the 1866 Act or the Freedmen's Bureau Acts (now 28 U. S. C. §1443(2) (1964)), remains unilluminated.

However, one point does emerge clearly from the debates and from the original statutory language. Contrary to the construction which this Court was subsequently to put on the "denial" clause (present §1443(1)) in a series of cases between *Virginia* v. *Rives*, 100 U. S. 313 (1880), and *Kentucky* v. *Powers*, 201 U. S. 1 (1906), see pp. 74-85, *infra*, Congress did not intend that removal be allowed only where state *statutory* law, federally unconstitutional on its face, denied a criminal defendant's federally protected rights. Certainly it is true that Southern resistance to the Thirteenth Amendment first took the form of Black Codes—statutory regulations directed expressly against the freed-

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I think we have the authority to confer that jurisdiction under the second clause of the constitutional amendment, which authorizes Congress to enforce by appropriate legislation the article declaring that "neither slavery nor involuntary servitude, except as a punishment for crime where of the party shall have been duly convicted, shall exist within the United States or in any place subject to their jurisdiction." That clause authorizes us to do whatever is necessary to protect the freedman in his liberty. The faith of the nation is bound to do that; and if it cannot be done without, would have authority to allow him to come to the Federal courts in all cases.

[85] See note 84, *supra*.

man.[86] It is also true that a major purpose of the act of 1866 was to counteract the Black Codes,[87] and although the *Rives-Powers* doctrine was never put on this ground by the Court, congressional concern over the Codes might be thought to support the doctrine. It does not, for several reasons.

First, the Black Codes were viewed by the 1866 Congress as overwhelming evidence that the Southern States, unless restrained by the federal government, would discriminate against the Negro and deprive him of his rights; in this light they were discussed as proof of the need for federal action, but not as its exclusive target.[88] Plainly, Congress

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[86] For typical Black Code provisions, see 2 COMMAGER, DOCUMENTS OF AMERICAN HISTORY 2-7 (6th ed. 1958); 1 FLEMING, DOCUMENTARY HISTORY OF RECONSTRUCTION 273-312 (photo reprint 1960); MCPHERSON, POLITICAL HISTORY OF THE UNITED STATES DURING THE PERIOD OF RECONSTRUCTION 29-44 (1871).

[87] The Codes were often referred to in debate. In the Senate: CONG. GLOBE, 39th Cong., 1st Sess. 474 (Jan. 29, 1866) (Trumbull); 602 (Feb. 2, 1866) (Lane), 603 (Wilson), 605 (Trumbull), 1759 (April 4, 1866) (Trumbull); in the House: *id.* 1118 (March 1, 1866) (Wilson), 1123-24 (Cook), 1151 (March 2, 1866) (Thayer), 1160 (Windom), 1267 (March 8, 1866) (Raymond). See also, *id.* at 340 (Jan. 22, 1866) (remarks of Senator Wilson on the amendatory freedmen's bureau bill).

[88] See the portions of the debates cited in note 87 *supra*, especially CONG. GLOBE, 39th Cong., 1st Sess. 603, 605, 1118, 1160. See also *id.* at 744-45 (Feb. 8, 1866) (remarks of Senator Sherman on the amendatory freedmen's bureau bill). And see *id.* at 1124, 1125 (March 1, 1866) (remarks of Representative Cook):

> Can any member here say that there is any probability, or any possibility, that these States will secure him in those rights? They have already spoken through their Legislatures; we know what they will do; these acts, which have been set aside by the military commanders, are the expressions of their will.
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> * * * * *
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> . . . Every act of legislation, every expression of opinion on their part proves that these people would be again enslaved if they were not protected by the military arm of the Federal Government; without that they would be slaves today.

anticipated massive Southern resistance to the Thirteenth Amendment, resistance not alone by legislation but by every means at southern state command.

> It was easy to foresee, and of course we foresaw, that in case this scheme of emancipation was carried out in the rebel States it would encounter the most vehement resistance on the part of the old slaveholders. It was easy to look far enough into the future to perceive that it would be a very unwelcome measure to them, and that they would resort to every means in their power to prevent what they called the loss of their property under this amendment. We could foresee easily enough that they would use, if they should be permitted to do so by the General Government, all the powers of the State governments in restraining and circumscribing the rights and privileges which are plainly given by it to the emancipated negro.[89]

Second, the Black Codes which concerned Congress were not all discriminatory and hence unconstitutional[90] on their face. Much mention was made in the debates of the Southern vagrancy laws[91] and particularly of the vagrancy law of Virginia,[92] for example, which was a color-blind statute[93]

[89] *Id.* at 503 (Jan. 30, 1866) (remarks of Senator Howard).

[90] The legislators who enacted the 1866 act regarded discriminatory legislation as unconstitutional by force of the thirteenth amendment.

[91] See, e.g., CONG. GLOBE, 39th Cong., 1st Sess. 1123-24 (March 1, 1866) (remarks of Representative Cook), 1151 (March 2, 1866) (remarks of Representative Thayer).

[92] *Id.*, at 1160 (March 2, 1866) (remarks of Representative Windom), 1759 (March 4, 1866) (remarks of Senator Trumbull).

[93] See Acts of Virginia, 1865-1866, at 91 (1866) (Act of Jan. 15, 1866).

whose evil lay in its systematically discriminatory application to the Negroes.[94]

Third, there is affirmative evidence that Congress was aware of and intended to redress nonstatutory denials of federal constitutional rights. Senator Trumbull told the Senate in his principal speech urging passage of the bill over President Johnson's veto:

> In some communities in the South a custom prevails by which different punishment is inflicted upon the blacks from that meted out to whites for the same offense. Does [section 2 of the 1866 act] . . . propose to punish the community where the custom prevails?
>
> Or is it to punish the person who, under color of the custom, deprives the party of his right? It is a manifest perversion of the meaning of the section to assert anything else.[95]

Congress knew, as we have heretofore seen, that the Union military commanders, recognizing the susceptibility to unfair and discriminatory application of Southern laws apparently fair on their faces, had taken steps to protect the freedmen against such maladministration by the provision of military tribunals to supersede the civil courts in freed-

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[94] Senator Wilson told the Senate that General Terry, as commander in Virginia, "seeing that the vagrant laws of that State were used to make slaves of men whom we have made free," had prohibited the enforcement of the law against Negroes. CONG. GLOBE, 1st Sess., 603 (Feb. 2, 1866). Terry's order is found in McPherson, *op. cit. supra*, note 86 at 41-42.

[95] CONG. GLOBE, 39th Cong., 1st Sess. 1758 (April 4, 1866). See also *id.* at 623 (Feb. 3, 1866) (remarks of Representative Kelley on the amendatory freedmen's bureau bill).

men's cases.[96] Congress adopted this policy itself in the Amendatory Freedmen's Bureau Act (companion legislation to the Civil Rights Act of 1866),[97] and it is implausible to suppose that the permanent civil rights legislation was intended to give the freedmen less substantial protection. Section 3 of the Civil Rights Act provided that removal might be had by persons "who are denied or cannot enforce in the courts or judicial tribunals of the State *or locality where they may be* any of the rights secured to them by the first section of this act." (Emphasis added.) This reference to locality strongly suggests that something less than statutory obstruction to the enforcement of federal rights in the State courts was thought sufficient to support removal.[98] The rights enumerated in section 1, included "full and equal benefit of all laws and *proceedings* for the security of person and property, as is enjoyed by white citizens . . . , any law, statute, ordinance, regulation, or *custom*, to the con-

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[96] See text and notes at notes 51-56, *supra*.

[97] The Amendatory Freedmen's Bureau Act was H. R. 613 of the Thirty-Ninth Congress. A predecessor bill, S. 60, was introduced by Senator Trumbull and reported by the Senator from the Judiciary Committee contemporaneously with S. 61, which became the Civil Rights Act of 1866. CONG. GLOBE, 39th Cong., 1st Sess. 129 (Jan. 5, 1866), 184 (Jan. 11, 1866).

[98] The "locality" provision was rephrased in REV. STAT. §641 (1875), pp. 69-70, *infra*, which turned removal on the inability to enforce federal rights "in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending . . ." This wording was carried forward in §31 of the Judicial Code of 1911, and appears in 28 U. S. C. §74 (1940). In the 1948 revision it was "omitted as unnecessary," Reviser's Note, p. 70 *infra*, presumably on the theory that one who may remove from "a State Court" may thereby remove from the court of any locality of a State. The omission tokens no substantive change in the statute.

trary notwithstanding." (Emphasis added.)[99] "Proceedings" was certainly intended to add something to "laws," and the inclusion of reference to "custom" was not inadvertent. Senator Trumbull several times told the Senate that it was intended to allow removal "in all cases where a custom prevails in a State, or where there is a statute-law of the State discriminating against [the freedmen] . . . ."[100] The Senator expressly said that it was not the existence of a statute, any more than of a custom discriminating against the freedman, that constituted such a failure of state process as would authorize removal; but in each case, custom or statute, it was the probability that the state court would fail adequately to enforce federal guarantees.[101] Senator Lane of Indiana similarly said that the evil to be remedied was not unconstitutional state legislation, but the probability that the state courts would not enforce the constitutional rights of the freedmen.[102]

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[99] Section 1 of the 1866 act was re-enacted, with its "notwithstanding" clause, by §§16 and 18 of the Enforcement Act of 1870 Act of May 31, 1870, 16 Stat. 144. It appears in REV. STAT. §1977 (now 42 U. S. C. §1981 (1964)), without the "notwithstanding" clause. A similar clause was omitted by the revisers in carrying forward §1 of the Act of April 20, 1871, 17 Stat. 13, as REV. STAT. §1979 (now 42 U. S. C. §1983 (1964)). In neither case does any intention appear to effect a substantive change. The "notwithstanding" clauses, although indicative of legislative purpose in respect of some applications of the statute—as here—never were effective provisions, since the supremacy clause of the Constitution made them unnecessary.

[100] CONG. GLOBE, 39th Cong., 1st Sess. 1759 (April 4, 1866); *id.* at 475 (Jan. 29, 1866); cf. *id.* at 1758 (April 4, 1866). See also *Blyew* v. *United States*, 80 U. S. (13 Wall.) 581, 593 (1871).

[101] See note 84, *supra*.

[102] CONG. GLOBE, 39 Cong., 1st Sess. 602-03 (Feb. 2, 1866). See also *id.* at 1265 (March 8, 1866) (remarks of Representative Broomall).

> One of the distinguished Senators from Kentucky [Mr. Guthrie] says that all these slave laws have fallen with the emancipation of the slave. That, I doubt not, is true, and by a court honestly constituted of able and upright lawyers, that exposition of the constitutional amendment would obtain.
>
> But why do we legislate upon this subject now? Simply because we fear and have reason to fear that the emancipated slaves would not have their rights in the courts of the slave States. The State courts already have jurisdiction of every single question that we propose to give to the courts of the United States. Why then the necessity of passing the law? Simply because we fear the execution of these laws if left to the State courts. That is the necessity for this provision.

In 1870 and 1871, Congress enacted the second and third Civil Rights Acts.[103] The 1870 statute was primarily Fifteenth Amendment legislation; it declared the right of all otherwise qualified citizens to vote without racial discrimination,[104] penalized interference with the franchise,[105] and created federal civil and criminal jurisdiction in all cases arising under the act.[106] In its sixteenth and seventeenth sections, designed to reestablish on Fourteenth Amendment footing the pre-Fourteenth Amendment Civil Rights Act of 1866, it reenacted with some extensions the first and

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[103] Act of May 31, 1870, ch. 114, 16 Stat. 140; Act of April 20, 1871, ch. 22, 17 Stat. 13.

[104] Act of May 31, 1870, ch. 114, §1, 16 Stat. 140.

[105] Act of May 31, 1870, ch. 114, §§2-7, 16 Stat. 140.

[106] Act of May 31, 1870, ch. 114, §8, 16 Stat. 142.

second sections of that Act,[107] and in its eighteenth section, it reenacted by reference the whole of the 1866 act, "Sections sixteen and seventeen hereof [to] . . . be enforced according to the provisions of said act."[108]

The 1871 statute went further, putting the remedial provisions of the 1866 act to broad new uses. This "Act to enforce the Provisions of the Fourteenth Amendment . . ." was designed to establish general federal civil rights jurisdiction superseding state judicial processes without respect to exhaustion of state remedies, "because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies."[109] Its first section provided:

> That any person who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall, any such law, statute, ordinance, regulation, custom, or usage of the State to the contrary notwithstanding, be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress; such

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[107] Act of May 31, 1870, ch. 114, §§16-17, 16 Stat. 144.

[108] Act of May 31, 1870, ch. 114, §18, 16 Stat. 144.

[109] *Monroe* v. *Pape*, 365 U. S. 167, 180 (1961). The purpose of the 1871 act to provide a federal forum for the vindication of federal civil rights notwithstanding failure to exhaust state remedies was reaffirmed in *McNeese* v. *Board of Educ.*, 373 U. S. 668 (1963) (alternative ground).

> proceeding to be prosecuted in the several district or circuit courts of the United States, with and subject to the same rights of appeal, review upon error, and other remedies provided in like cases in such courts, under the provisions of the act of the ninth of April, eighteen hundred and sixty-six, entitled "An Act to protect all persons in the United States in their civil rights, and to furnish the means of their vindication"; and the other remedial laws of the United States which are in their nature applicable in such cases.[110]

Also, in 1871, Congress amended the Second Civil Rights Act of 1870, adding detailed administrative provisions for the enforcement of voting rights. Here again it authorized removal of suits or prosecutions against officers or persons acting under the amendatory statute.[111]

Four years later the last major Civil Rights Act of the Nineteenth Century was enacted, affirming the right of Negroes to equal public accommodation. Like its predecessors, the statute contained jurisdictional provisions making the federal trial courts the agencies of its enforcement.[112] In the same year the Judiciary Act created general federal question jurisdiction in original and removed civil actions,[113] thereby for the first time permanently establishing a federal trial forum for every litigant engaged in a significant civil controversy based on a claim arising under the federal

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[110] Act of April 20, 1871, ch. 22, §1, 17 Stat. 13. These provisions are carried forward in part in present 28 U. S. C. §1343(3) (1964); Rev. Stat. §1979 (1875), 42 U. S. C. §1983 (1964).

[111] Act of Feb. 28, 1871, ch. 99, §16, 16 Stat. 438.

[112] Act of March 1, 1875, ch. 114, 18 Stat. 335.

[113] Act of March 3, 1875, ch. 137, §§1-2, 18 Stat. 470.

constitution and laws.[114] Save for petty controversies, federal trial jurisdiction was now made coextensive with the concern for effective enforcement of national law; on the widest front, Congress gave expression to the assumption of Hamilton and Madison that federal judges "are more likely to give full scope to any given Supreme Court decision and particularly ones unpopular locally, than are their state counterparts."[115]

The Revised Statutes of 1875, then, carried forward extensive new grants of federal trial jurisdiction created during the preceding dozen years, among them the civil rights removal statutes, codified with some change of language in section 641:

> Sec. 641. When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States, or against any officer, civil or military, or other person, for any arrest or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defen-

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[114] See 28 U. S. C. §§1331, 1441 (1964).

[115] Mishkin, The Federal "Question" in the District Courts, 53 COLUM. L. REV. 157, 158 (1953).

> dant, filed in said State court at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. Upon the filing of such petition all further proceedings in the State courts shall cease, and shall not be resumed except as hereinafter provided.

In 1911, in the course of abolishing the old Circuit Courts, Congress technically repealed Rev. Stat. §641 (Judicial Code of 1911, ch. 231, §297, 36 Stat. 1168), but carried its provisions forward without change (except that removal jurisdiction was given the district courts in lieu of the circuit courts) as §31 of the Judicial Code (Judicial Code of 1911, ch. 231, §31, 36 Stat. 1096). Section 31 verbatim became 28 U. S. C. §74 (1940), and in 1948, with changes in phraseology, it assumed its present form as 28 U. S. C. §1443 (1964). The reviser's note to §1443 indicates that no substantive changes were intended. H. R. Rep. No. 308, 80th Cong., 1st Sess. A134 (1947).

There is no blinking the message of this history. As a result of the Reconstruction legislation, representing a radical change of Congressional attitude toward the States and particularly the state courts, the federal trial courts assumed the role in which the most foresighted members of the Constitutional Convention had cast them—as the necessary, the indispensable instruments for the enforcement of federal rights.[116] The Thirteenth, Fourteenth, and Fifteenth Amendments had now written into the Constitution broad new national guarantees of liberty and equality, committing

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[116] Frankfurter & Landis, *The Business of the Supreme Court* 64-65 (1927).

the federal government to protect the individual against the States. The four major civil rights acts had undertaken to establish the new liberties and each of the acts made the federal trial courts the front line of federal protection. Power had been given those courts in civil actions to enjoin or redress every deprivation by the States of "rights, privileges, or immunities secured by the Constitution," using every remedial device known to federal law.[117] Habeas corpus, "the most celebrated writ in the English law," [118] "the great and efficacious writ in all manner of illegal confinement," [119] was given the federal judges "in all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law." [120] No longer reluctant to disrupt state criminal prosecutions which had proved potent instruments of harassment, Congress had enacted criminal removal statutes in 1863 and 1866 covering cases arising out of the Civil War, in 1864 and 1866 covering cases arising out of enforcement of the wartime revenue acts, in 1866 covering cases of all persons prosecuted for acts under color of authority of civil rights law and all persons who could not enforce their newly given civil rights in the state courts, in 1871 covering voting enforcement cases. Plainly, it seemed that the Reconstruction Congresses had accomplished their principal nationalizing

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[117] Section 1 of the Ku Klux Klan Act of 1871. See also the broad authorization of Rev. Stat. §722 (1875), 42 U. S. C. §1988 (1964), deriving from §3 of the first Civil Rights Act; *Lefton* v. *Hattiesburg*, 333 F. 2d 280 (5th Cir. 1964); *Brazier* v. *Cherry*, 293 F. 2d 401 (5th Cir.), (1961); *Pritchard* v. *Smith*, 289 F. 2d 153 (8th Cir. 1961).

[118] 3 BLACKSTONE, COMMENTARIES 129 (6th ed., Dublin 1775).

[119] *Id.* at 154.

[120] Act of February 5, 1867, ch. 28, §1, 14 Stat. 386.

purpose: the effective protection of freedoms won in battle and secured against state action by the post-war constitutional amendments and statutes, through the extension of the sheltering arm of a plenary federal trial court jurisdiction.

Yet what the Reconstruction Congresses had painstakingly achieved was beclouded by a series of decisions of the post-Reconstruction Supreme Court of the United States. Those decisions are far narrower than has frequently been supposed—all, as will be shown in the next section of this brief, speak to a single, very limited issue—but the opportunity which the Court's opinions gave to the federal district courts to disembarrass themselves of unwanted business was widely seized upon; the district courts extended the Supreme Court's removal decisions unwarrantedly; the result was virtual judicial repeal of what is now 28 U. S. C. §1443(1) (1964). And, because remand orders were thought to be nonappealable between 1887 and 1964, the lower courts' construction of the removal statute stood and froze.

In the Civil Rights Act of 1964, congressional reaction to that construction was expressed. With the palpable purpose of undoing the district courts' decisions which had made a worthless nullity of the civil rights removal statute,[121] Con-

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[121] See, e.g., 110 CONG. REC. 6551 (March 30, 1964) (remarks of Senator Humphrey), 6564 (remarks of Senator Kuchel). And see particularly *id.* at 6955 (April 6, 1964) (remarks of Senator Dodd):

> An examination of the legislative history of the act of 1866, which first authorized such removals, of the language of that act and its successors, and of the apparent congressional purpose clearly suggests that these old interpretations are erroneous . . .
>
> Accordingly the removal statute, intended by Congress to be . . . one of the great bulwarks of equality, is of little or

gress made civil rights remand orders appealable.[122] The freeze was broken, and the invocation of that new appellate jurisdiction brings the present cases to this Court.

2. *Judicial Background*

The body of this Court's decisions dealing with civil rights removal remains to be considered. All are concerned with the predecessor of present 28 U. S. C. §1443(1) (1964). The provision that is now §1443(2) has never been before the Court.

The predecessor of §1443(1)[123] was first construed by the Supreme Court in 1880, in *Strauder* v. *West Virginia,* 100 U. S. 303 (1880). There, the Court sustained removal on the petition of a Negro indicted for murder in a West Virginia court which alleged that by reason of an 1873 West Virginia statute restricting eligibility for jury service to white males, Negroes were excluded from grand and petit juries in the courts of that State. Strauder was adjudged a person who is "denied" or who "cannot enforce" his federal equal civil rights. Since his removal petition was filed (as

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no value today . . . If an appeal is allowed from orders to remand, the appellate courts will be able to consider what the removal statute means and what Congress intended when it enacted the statute.

In recent months and years a number of cases have arisen which could properly have been removed from State to Federal court if the original intention of Congress had been permitted to govern.

[122] 28 U. S. C. §1447(d), as amended by §901, Civil Rights Act of 1964, 78 Stat. 241, 266.

[123] The provision was then Rev. Stat. §641 (1875). In the concept presently material—the concept of a person "denied or [who] cannot enforce" rights in the state courts—the statute has remained unchanged from 1866 to the present.

it had to be) before state trial[124] and was sufficient, if ever, at that time, the Court clearly held that the potential applicability of an unconstitutional state statute to his case gave Strauder grounds for removal without inquiry into possibility that the state courts might sustain his constitutional claim and void the unconstitutional state legislation, as the supremacy clause obliged them to do. The state statute directed the state judges to an unconstitutional conclusion, and the Supreme Court found the conditions of removability satisfied.

But, in *Virginia* v. *Rives*, 100 U. S. 313 (1880), decided the same day, removal was denied. In *Rives* a federal trial court assumed removal jurisdiction on a petition alleging that petitioners were Negroes charged with murder of a white man; that there was strong race prejudice against them in the community; that the grand jury which indicted them and the jurors summoned to try them were all white;

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[124] Rev. Stat. §641 (1875) required that a petition for removal be filed "at any time before the trial or final hearing of the cause." Present 28 U. S. C. §1446(c)(1964) requires filing "at any time before trial." This pretrial character of the removal procedure, which played a significant part in the construction given the civil rights removal statute in and following *Virginia* v. *Rives*, 100 U. S. 313 (1880), appears not to have been an incident of the procedure authorized by the original 1866 act. That act contained no independent procedural provisions, but adopted by reference the removal procedures of the Habeas Corpus Suspension Act of March 3, 1863, ch. 81, §5, 12 Stat. 755, 756. The 1863 act had authorized removal either before trial, 12 Stat. 756, *or after judgment*, 12 Stat. 757; from the 1866 language, *both* these forms of removal were meant to be carried over to civil rights cases. See Senator Trumbull's speech set out in note 84 *supra*. The Act of May 11, 1866, ch. 80, §3, 14 Stat. 46 amended the 1863 procedures to authorize pretrial removal at any time before empaneling of a jury in the state court. Although this act explicitly provided that it did not affect post-judgment removal, Rev. Stat. §641 failed to carry that form of removal forward in civil rights cases.

that the prosecutor and judge had refused petitioners' request that one-third of the trial jury be composed of Negroes; that, notwithstanding the state laws required jury service of males without discrimination of race, Negroes had never been allowed to serve as jurors in the county in any case in which their race was interested.

The State of Virginia sought a writ of mandamus in the Supreme Court to compel the lower federal court to remand the case, and the Supreme Court issued the writ. Its opinion, read narrowly, found that petitioners' allegations "fall short of showing that any civil right was denied, or that there had been any discrimination against the defendants because of their color or race. The facts may have been as stated, and yet the jury which indicted them, and the panel summoned to try them, may have been impartially selected." [125] There was wanting, as a matter of pleading (in those early days before the Court's experience in the trial of jury discrimination claims bred the "prima facie" showing doctrine),[126] an allegation of purposeful or intentional discrimination, and the Court said that this might have been supplied by averment that a statute of the State barred Negroes from jury service. "When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal." [127] Thus, by reason of the requirement of

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[125] 100 U. S. at 322.

[126] See, e.g., *Norris* v. *Alabama*, 294 U. S. 587 (1935); *Hernandez* v. *Texas*, 347 U. S. 475 (1954); *Reece* v. *Georgia*, 350 U. S. 85 (1955); *Eubanks* v. *Louisiana*, 356 U. S. 584 (1958); *Arnold* v. *North Carolina*, 376 U. S. 773 (1964).

[127] 100 U. S. at 321.

a factual showing under the removal statute that a defendant could not enforce his federal rights in the state court,[128] the Court said that the inability to enforce federal rights of which the removal statute speaks "is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case."[129]

So construed, *Rives* held no more than that the removal petitioners' allegations were insufficient to state a claim of unconstitutional jury discrimination under the standards then prevailing, and its comments on the existence or nonexistence of discriminatory legislation were merely speculation on sorts of allegations which would be sufficient. But the case could also be read rather loosely as saying that unless a state constitution or statute on its face denied a defendant's federal constitutional rights, his case was not removable under present subsection 1443(1).[130]

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[128] But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him. When he has only an apprehension that such rights will be withheld from him when his case comes to trial he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to remove his case.

Id. at 320. Elsewhere the Court treated the problem as one of showing that a defendant's rights are denied *"in the judicial tribunals of the State," id.* at 321 (emphasis in original), within the meaning of the statute, merely another manner of stating the same concern.

[129] *Id.* at 319.

[130] The Court also said: "In other words, the statute has reference to a legislative denial or an inability resulting from it." *Id.* at 319-320.

Without adequate consideration of the point, the Court in *Neal* v. *Delaware*[131] took this latter view of *Rives*. Like *Rives*, the *Neal* case involved a Negro defendant indicted for a capital offense. His removal petition alleged that Negroes were systematically excluded from grand and petit juries in the state courts, and that this exclusion was by reason of an 1831 constitutional provision of the State of Delaware, disqualifying Negroes as electors, hence as jurors. The Delaware court in which, pursuant to the removal practice then in force, Neal filed his removal petition[132] took the view that the 1831 provision had been rendered void by the supervention of the Fourteenth and Fifteenth Amendments, so that, if there was any jury discrimination in Delaware—which, in any event, the Delaware court found that Neal had failed to prove—such discrimination was unauthorized by state constitution or statute. On writ of error to the Delaware court, the Su-

[131] 103 U. S. 370 (1881).

[132] Prior to 1948, removal procedure differed under the various federal removal statutes. In a civil rights case, the petition for removal was filed in the state court in which the case originated. See Rev. Stat. §641 (1875), continued by Judicial Code of 1911, §31, 36 Stat. 1096. If the state court declined to allow the removal, exception to that ruling could be preserved for examination by the Supreme Court of the United States on review of the final state court judgment, as in *Neal*. Alternatively, petition could be made to the federal trial court to which removal had been sought and disallowed by the state court, and that court might effect the removal by issuance of process which terminated the state proceeding, as in *Rives*. See the description of similar procedures in *Metropolitan Cas. Ins. Co.* v. *Stevens*, 312 U. S. 563 (1941).

The 1948 Code revision made removal practice uniform; under the uniform procedure, the petition for removal is filed in the first instance in the federal district court to which removal is sought, and this filing (with appropriate service on the state court and opposing party) effects removal, ousting the state court of jurisdiction unless and until the federal court remands. 28 U. S. C. §§1446-47 (1964).

preme Court disagreed that Neal had failed to show systematic exclusion of Negroes from the grand jury, and it reversed Neal's conviction for error in overruling his motion to quash the indictment and jury panels. But the Supreme Court agreed with the court below that this discrimination was unauthorized by statute and, in extended dictum, sustained denial of the removal petition. As the Court read *Strauder* and *Rives*, those cases held

> that the constitutional amendment was broader than the provisions of sect. 641 [present subsection 1443(1)] . . . ; that since that section only authorized a removal before trial, it did not embrace a case in which a right is denied by judicial action during the trial, or in the sentence, or in the mode of executing the sentence; that for denials, arising from judicial action, after the trial commenced, the remedy lay in the revisory power of the higher courts of the State, and, ultimately, in the power of review which this court may exercise over their judgments, whenever rights, privileges, or immunities, secured by the Constitution or laws of the United States, are withheld or violated; and that the denial or inability to enforce in the judicial tribunals of the States, rights secured by any law providing for the equal civil rights of citizens of the United States, to which sect. 641 refers, is, primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. We held that Congress had not authorized a removal where jury commissioners or other subordinate officers had, without authority derived from the Constitution and laws of the State,

excluded colored citizens from juries because of their race. (103 U. S. at 386-87.)

"The essential question, therefore," said the Court, was whether Negroes were excluded from Delaware juries "by reason of the Constitution and laws of Delaware"; [133] and, finding that "the alleged discrimination in the State of Delaware, against citizens of the African race, in the matter of service on juries, does not result from her Constitution and laws," [134] the Court ruled removal unauthorized.

This ruling was repeated in a series of substantially identical cases at the end of the nineteenth century. In each case the defendant was a Negro charged with murder in a state court who based his removal petition upon allegations of systematic exclusion of Negroes from the grand and petit juries. In *Gibson* v. *Mississippi*, 162 U. S. 565 (1896); *Smith* v. *Mississippi*, 162 U. S. 592 (1896); and *Murray* v. *Louisiana*, 163 U. S. 101 (1896), it was alleged that this exclusion was practiced by local officials without authority of statute or state constitution. Smith and Murray moved to quash the indictment, petitioned the state court for removal, and challenged the venire or panel of trial jurors, all on the same equal protection grounds. Gibson did not move to quash the indictment but did petition for removal and challenged the petit jury. In all three cases, this Court affirmed the convictions, sustaining the denial of the removal petitions on the ground that no state statute or constitution denied the defendants their equal civil rights, and sustaining denial of the respective motions to quash or

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[133] *Id.* at 387.

[134] *Id.* at 389.

challenges to the petit jury on the ground that no sufficient case of discrimination was established. The *Gibson* and *Murray* opinions repeated substantially the passage from *Neal* quoted above, and *Smith* relied on *Gibson*.

In *Bush* v. *Kentucky*, 107 U. S. 110 (1883), the exclusion of Negro jurors was allegedly practiced under an 1873 Kentucky statute making only whites competent to serve as grand and petit jurors. Motions to quash the indictment, petitions for removal, and a challenge to the panel of petit jurors (the last being formally inadequate to raise a federal claim) were made and overruled. On review, this Court found that prior to Bush's indictment and trial the Kentucky Court of Appeals had declared the 1873 statute unconstitutional and void; the ruling put Bush in a posture identical to Neal's in Delaware, and the Court sustained denial of the removal petition on authority of *Neal*. As in *Neal*, the Court found the claim of grand jury discrimination supported on the record and reversed the conviction for error in denying the motion to quash.

In *Williams* v. *Mississippi*, 170 U. S. 213 (1898), defendant claimed not merely that administrative officials had systematically excluded Negroes from juries, but also that the provisions of the Mississippi constitution and statute prescribing the procedures for qualifying electors and jurors (only electors being competent jurors) were

> but a scheme on the part of the framers of that constitution to abridge the suffrage of the colored electors in the State of Mississippi on account of the previous condition of servitude by granting a discretion to the said officers as mentioned in the several sections of the constitution of the State and the statute of the

> State adopted under the said constitution, the use of said [*sic*: which] discretion can be and has been used in the said . . . County to the end complained of. (*Id.* at 214.)

It was alleged that the constitution was drawn by a constitutional convention of 133 white and one Negro members, which refused to submit the new constitution to popular vote for adoption, because of the heavy preponderance of Negro voters qualified under prior law; and that the legislature acted immediately under the new constitution, with a purpose to discriminate against Negroes in the franchise, by passing a statute which gave local election managers wide discretion in judging the qualifications of persons registering to vote. Motions to quash the indictment and for removal were made and denied. Williams was convicted; the Mississippi Supreme Court and the Supreme Court of the United States affirmed. Sustaining denial of the motion for removal, the Court began by quoting from *Gibson* the standard paragraph from *Neal*. It noted that no claim was made that the Mississippi constitution or statute was discriminatory on its face; and it concluded that the well-pleaded factual averments of the defendant's motions failed to present "sufficient allegation of an evil and discriminating administration" of the State's laws. 170 U. S. at 222. On these grounds, the motion to quash, as well as that for removal, was held correctly denied.

Obviously, as a technical matter, none of the cases after *Rives* held or could hold anything on the question of construction of the removal statute. Each case came to this Court on review of state court judgments of conviction (see note 132 *supra*); in each, the same jury-exclusion claim

which was the basis for a removal petition was, on an identical record, the basis for a motion to quash or other attack on the grand or petit jury; where (as in all cases save *Bush* and *Neal*) this Court affirmed, it necessarily rejected the jury-exclusion claim on substantive grounds and therefore made it unnecessary to decide whether a valid claim of this sort would sustain removal; and where (as in *Bush* and *Neal*) this Court reversed on grounds that the substantive claim supported a motion to quash, rejection of the removal claim was equally unnecessary to decision. *Rives* itself—the only responsible holding on the issue of removal—was, of course, ambiguous. Notwithstanding this, by 1898 the Court clearly supposed it had long since settled that removal under present §1443(1) was allowable only on a claim of facial unconstitutionality of a state statute or constitutional provision.

In *Kentucky* v. *Powers*, 201 U. S. 1 (1906), the Court handed down its last decision discussing the removal section.[135] Following three trials for murder in a Kentucky court, each resulting in conviction reversed on appeal by the Kentucky Court of Appeals, Powers, prior to his fourth trial, filed his petition alleging (1) that the killing with which he was charged had occurred during the course of a

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[135] Between 1887 and 1964 it was generally supposed that orders of a lower federal court remanding to a state court proceedings sought to be removed from it were not reviewable by the federal appellate courts. See Act of March 3, 1887, ch. 373, §2, 24 Stat. 553, as amended, Act of Aug. 13, 1888, ch. 866, 25 Stat. 435. Preservation of a removal point through state appeals following adverse final judgment, was generally bootless, for the reason that it added nothing to other federal claims so preserved. When the lower courts began to deny civil rights removal generally on the authority of *Powers* and its immediate predecessors, there was therefore no occasion for Supreme Court consideration of the issues decided below.

factional dispute, accompanied by widespread political excitement and animosity, involving contested elections for all of the major state offices; (2) that Powers had been the Republican candidate for secretary of state; one Taylor the Republican candidate for governor; and Goebel, the man with whose murder Powers was charged, the Democratic candidate for governor; (3) that Goebel's killing aroused intense hostility toward Powers on the part of Goebel Democrats and inflamed them against him; and that this hostility continued throughout his three trials and still existed; (4) that in each of Powers' three trials the sheriff and deputies charged with jury selection, all being Goebel Democrats, connived with the trial judge to violate the regular state procedures for selecting juries, and instead systematically excluded Republicans and Independents from the jury panels and selected Goebel Democrats for the purpose of assuring Powers' conviction; (5) that the judge at each trial denied Powers' requests that the jury be selected equally from both political parties (approximating the roughly equal popular vote each had polled at the last election), or that the jury be selected without reference to party, and overruled Powers' objections to jurors selected by systematic exclusion of Republicans and Independents; (6) that on each appeal, by force of a Kentucky statute which made certain trial court rulings unreviewable, the Kentucky Court of Appeals had held it had no power to upset the trial judge's rulings on the jurors—which decisions were the law of the case and as binding on the Kentucky courts as statutes; (7) that at each trial, Powers had pleaded in bar a pardon issued to him by Governor Taylor, who at the time of its issuance was the duly elected and acting governor of the State; that the trial judge had refused to admit the pardon as a defense (this being the

first time in Kentucky jurisprudence that a Kentucky court refused to give effect to an executive pardon); and on each appeal the court of appeals had sustained this ruling—which decisions also were the law of the case and binding on the Kentucky courts; (8) that Powers was confined in jail without bail awaiting a fourth trial and for all the foregoing reasons was unable to obtain a fair trial in the Kentucky courts.[136] The lower federal court assumed jurisdiction on removal, concluding

> that the prior action of the Scott Circuit Court denying the defendant the equal protection of the laws is a real hindrance and obstacle to his asserting his right thereto in a future trial therein—just as real as an unconstitutional statute would be—and that the defendant is denied the equal protection of the laws in said court, within the meaning of said section, and entitled to a removal on account thereof.[137]

On the State's appeal and petition for mandamus, this Court held that such a ruling was error, that removal was improper, and it ordered the case remanded to the state court. The Court noted that, notwithstanding the state court of appeals would not entertain Powers' claims of denial of his federal rights, review of those claims could be had by writ of error issued from this Court to the

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[136] Although this fact is not mentioned in the Supreme Court's opinion, it appears that each of the previous reversals of Powers' convictions by the Court of Appeals of Kentucky had been by 4–3 vote of that court; that, following the third reversal one judge who had on each occasion voted to reverse retired from the bench, and was succeeded by the judge who had presided at each of Powers' first two trials. See *Kentucky* v. *Powers*, 139 Fed. 452, 458-59 (C. C. E. D. Ky. 1905), rev'd 201 U. S. 1 (1906).

[137] 139 Fed. at 487.

state trial court after conviction. And as the Court read its earlier cases, those cases

> expressly held that there was no right of *removal* under section 641, where the alleged discrimination against the accused, in respect of his equal rights, was due to the illegal or corrupt acts of administrative officers, unauthorized by the constitution or laws of the State, as interpreted by its highest court. For wrongs of that character the remedy, it was held, is in the state court, and ultimately in the power of this court, upon writ of error, to protect any right secured or granted to an accused by the Constitution or laws of the United States, and which has been denied to him in the highest court of the State in which the decision, in respect of that right, could be had.[138]

For almost sixty years after *Powers*, the lower federal courts consistently held that unless a state constitutional or statutory provision unconstitutional on its face was alleged to deprive a defendant of his federal rights, removal under present section 1443(1) was unauthorized.[139]

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[138] 201 U. S. at 31.

[139] *Hull* v. *Jackson County Circuit Court*, 138 F. 2d 820 (6th Cir. 1943) (alternative ground) (prejudiced judge in state post-conviction proceeding, *semble*); *Maryland* v. *Kurek*, 233 F. Supp. 431 (D. Md. 1964) (denial of speedy trial); *North Carolina* v. *Alston*, 227 F. Supp. 887 (M. D. N. C. 1964) (trespass charges unconstitutional under equal protection clause as applied to sit-ins; state supreme court has previously rejected this claim); *City of Clarksdale* v. *Gertge*, 237 F. Supp. 213 (N. D. Miss. 1964) (prosecution of civil rights worker for taking photographs in city hall without mayor's permission is designed to harass voter registration; hostile and racially discriminatory state courts; Negro exclusion from juries and from electorate electing state judges); *In re Kaminetsky*, 234 F. Supp. 991 (E. D. N. Y. 1964) (state contempt

The decision below, in the exercise of the appellate jurisdiction given by the Civil Rights Act of 1964, was the first to distinguish *Powers* and to authorize removal in the absence of a facially unconstitutional state statute.[140]

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proceeding will compel self-incriminating testimony); *Arkansas* v. *Howard*, 218 F. Supp. 626 (E. D. Ark. 1963) (hostile and racially prejudiced prosecutor and community; discriminatory prosecution; Negro jury exclusion; offense charged for conduct protected by federal court order); *City of Birmingham* v. *Croskey*, 217 F. Supp. 947 (N. D. Ala. 1963) (state policy of racial discrimination; Negro exclusion from juries and electorate electing state judges; jury hostility; charges void for vagueness and unconstitutional as applied apparently on first amendment and equal protection grounds); *Van Newkirk* v. *District Attorney*, 213 F. Supp. 61 (E. D. N. Y. 1963) (trial delay and pretrial hospital commitment without hearing); *Petition of Hagewood*, 200 F. Supp. 140 (E. D Mich. 1961) (prejudiced jury and trial judge; discriminatory enforcement of recidivist statute; various procedural errors); *Rand* v. *Arkansas*, 191 F. Supp. 20 (W. D. Ark. 1961) (prejudiced jury); *Hill* v. *Pennsylvania*, 183 F. Supp. 126 (W. D. Pa. 1960) (alternative ground) (denial of speedy trial); *Louisiana* v. *Murphy*, 173 F. Supp. 782 (W. D. La. 1959) (charge under licensing statute discriminatorily administered); *Texas* v. *Dorris*, 165 F. Supp. 738 (S. D. Tex. 1958) (prosecutor, judge, and jury controlled by complainant); *California* v. *Lamson*, 12 F. Supp. 813 (N. D. Cal.), *petition for leave to appeal denied*, 80 F. 2d 388 (Wilbur, Circuit Judge, 1935) (prejudiced jury); *New Jersey* v. *Weinberger*, 38 F. 2d 298 (D. N. J. 1930) (prejudiced trial judge). And see *California* v. *Chue Fan*, 42 Fed. 865 (C. C. N. D. Cal. 1890), and *Ex parte Wells*, 29 Fed. Cas. 633 (No. 17368) (Bradley, Circuit Justice, 1878), anticipating *Powers*.

Even claims that the statute under which the defendant was charged was facially unconstitutional were held insufficient to support removal in *Snypp* v. *Ohio*, 70 F. 2d 535 (6th Cir. 1934) (alternative ground) (Blue Sky law), and *North Carolina* v. *Jackson*, 135 F. Supp. 682 (M. D. N. C. 1955) (statute requiring racial segregation on buses), on the ground that it was not shown that the state courts would not fairly entertain the federal claim.

[140] The decision below has been followed in this regard by *Robinson* v. *Florida*, 345 F. 2d 133 (5th Cir. 1965); *Peacock* v. *City of Greenwood*, 347 F. 2d 679 (5th Cir. 1965); *Cox* v. *Louisiana*, 348 F. 2d 750 (5th Cir. 1965); *Wechsler* v. *County of Gadsden*, 351 F. 2d 311 (5th Cir. 1965); *McNair* v. *City of Drew*, 351 F. 2d

B. The Construction of 28 U. S. C. §1443

28 U. S. C. §1443 (1964) provides:

> §1443. *Civil Rights Cases.*
>
> Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:
>
> (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
>
> (2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

In their petition for removal, defendants invoked both subsections of the statute, asserting that they were denied and could not enforce in the Georgia courts certain federal rights (R. 4), and that they were being prosecuted for acts under color of authority of federal law providing for those rights (*ibid.*). The rights referred to did not include those

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498 (5th Cir. 1965); *Galloway* v. *City of Columbus*, 5th Cir., No. 22935, decided November 24, 1965; *Cooper* v. *Alabama*, 5th Cir., No. 22424, decided December 6, 1965; and, e.g., *Alabama* v. *Boynton*, S. D. Ala., C. A. No. 3560-65, decided April 16, 1965; *In re Wright*, M. D. Ala., Cr. No. 11739N, decided August 3, 1965; *McMeans* v. *Mayor's Court of Fort Deposit*, M. D. Ala., Cr. No. 11759N, decided September 30, 1965; *Hughley* v. *City of Opelika*, M. D. Ala., Cr. No. 2319E, decided Nov. 19, 1965.

given by the public accommodations title of the Civil Rights Act of 1964, which had not been passed at the time of filing of the petition. Nevertheless, by virtue of this Court's decision in *Hamm* v. *City of Rock Hill*, 379 U. S. 306 (1964), the court of appeals read the petition in light of the supervening rights given by that title; it held that the petition sufficiently alleged that the trespass prosecutions sought to be removed were based upon defendants' failure to leave covered establishments whose owners refused them service solely on account of race; it concluded that the maintenance of such prosecutions denied defendants' rights, and made them unable to enforce rights, provided by sections 201 and 203 of the act; and it therefore sustained removal under §1443(1), without reaching any question of the application of §1443(2). Georgia has not challenged here the propriety of the court of appeals' invoking the public accommodations provisions of the 1964 act, if the factual allegations of the petition adequately bring defendants within the protection of those sections.[141] Nor does it contend that the public accommodations title of the Civil Rights Act of 1964 is not a "law providing for equal rights" within §1443(2), or that the rights given by sections 201 and 203 are not rights "under any law providing for the equal civil rights of citizens . . . or of all persons" within §1443(1). These issues seem hardly questionable.[142] Georgia does contend, however, that, consistently

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[141] Georgia does contend that the allegations are inadequate. This contention is addressed in Part III of this brief, *infra*.

[142] The court of appeals was plainly right in testing the sufficiency of the petition in light of the public accommodations title of the Civil Rights Act of 1964. If the petition's factual allegations brought defendants within the protection of that title as construed in *Hamm*, no reason appears for denying them its benefit. Surely, after the supervening statute, the court of appeals might

with *Rives* and *Powers*, the defendants cannot be said to be denied or unable to enforce their rights (§1443(1)) unless the statute under which they are charged is uncon-

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have remanded the case to permit amendment of the petition, cf. *Maryland* v. *Soper* (No. 1), 270 U. S. 9, 36 (1926); but this would have been a wasted and profitless procedure. Under the notice-pleading provisions of 28 U. S. C. §1446(a) (1964), see Part III *infra*, a petition filed after the passage of the public accommodations title and "containing a short and plain statement of the facts which entitle [the petitioners] . . . to removal" under the title would not be deficient for lack of a statutory citation; and the same petition cannot be the less sufficient because filed before the title was enacted.

The court of appeals was also plainly right in holding that the public accommodations title of the Civil Rights Act of 1964 is a "law providing for the equal civil rights of citizens . . . or of all persons," within §1443(1), and a "law providing for equal rights" within §1443(2). (The two phrases have the same meaning. See Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. PA. L. REV. 793, 864 n. 270 (1965).) The construction of the quoted language is at issue in several cases now pending in this Court, e.g., *City of Chester* v. *Anderson*, 347 F. 2d 823 (3d Cir. 1965), petition for certiorari filed as O. T. 1965, No. 443, and in numerous others now in the lower federal courts; but neither those authorities which have given it a narrow compass nor those who view it more liberally have supported any meaning which would not include the Civil Rights Act of 1964. Compare *New York* v. *Galamison*, 342 F. 2d 255, 268 (1965), with Amsterdam, *supra*, at 869. Since the act's inclusion is clear and is not challenged by Georgia in this case, further discussion here seems unnecessary. Defendants' counsel, however—being counsel in a number of cases in the lower courts as well as in the *Anderson* case, *supra*—hope this Court will not think it amiss for them respectfully to suggest that the Court's opinion here can avoid any risk of improper inference possibly affecting those cases if the opinion makes it clear that no issue is contested in the present case requiring decision of the question what federal laws are laws "providing for . . . equal rights" within §1443. The number of cases in the courts below, and the eagerness of those courts for enlightenment with respect to the several unsettled issues of construction of the civil rights removal statute makes it particularly likely that any opinion of this Court discussing §1443 will be taken to shed light on those issues far beyond its intendment.

stitutional on its face—or unless, at least, it is alleged that the Georgia courts will not fairly enforce those rights. And it asserts that defendants' act in the exercise of rights given by the public accommodations title are not thereby "under color of authority derived from" that title (§1443(2)). Both contentions are untenable.

1. ***The Court of Appeals Correctly Held That Persons Prosecuted for Exercising Their Right to Equal Public Accommodations Under the Civil Rights Act of 1964 Are Thereby Denied and Unable to Enforce Those Rights, Within the Meaning of §1443(1), Notwithstanding the Statutes Underlying the Prosecutions Are Not Unconstitutional on Their Face and the State Courts Are Not Alleged to Be Unfair.***

Georgia argues that this Court's decisions from *Virginia* v. *Rives* to *Kentucky* v. *Powers* disallow removal under present §1443(1) unless a criminal defendant seeking to remove can point to some state statutory or constitutional provision, applicable to his prosecution in the state courts, which is unconstitutional on its face (Br. 30, 31-34, 42-43, 46). These decisions, the State urges, have limited the denials of and the inabilities to enforce federal rights, of which the statute speaks, to denials and inabilities by reason of facially unconstitutional state legislation. Any inquiry concerning application of the *Rives-Powers* doctrine to this case must begin with inquiry into the nature and provenience of that doctrine.

Nothing in the language of §1443(1) as it now is or ever was written supports the limitation of its operation to instances of state legislation which on its face denies federal rights. Indeed, the wording of the original 1866 enactment strongly suggests that no such limitation was intended, see pp. 64-65 *supra*, and the pertinent legislative

history is plain as a pikestaff against the limitation, see pp. 56-66 *supra*. Experience has not suggested that statutory denials of federal civil rights are more numerous or more grievous than non-statutory denials; to the contrary, as Senator Dodd recently put it, "by far the most serious denials of equal rights occur as a result not of statutes which deny equal rights upon their face, but as a result of unconstitutional and invidiously discriminatory administration of such statutes." 110 Cong. Rec. 6955 (April 6, 1964). The obvious justification for congressional creation of a federal *trial* jurisdiction on removal is not that facially unconstitutional state statutes may be so declared. Such statutes, bearing their defect in the written word, have been and can always be readily disarmed by this Court on direct review of the final judgments of the state courts.[143] *Removal* is needed and justified to ward against impingements on federal rights which are less obvious,

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[143] This Court's jurisdiction on direct review was mandatory in such cases under the First Judiciary Act, of 1789, and continued so under the 1867 amendatory act. Act of Feb. 5, 1867, ch. 28, §2, 14 Stat. 386. Since the Act of Sept. 6, 1916, ch. 448, §2, 39 Stat. 726, the Court has mandatory jurisdiction by appeal to review the judgment of the highest court of a State in which decision can be had in any case in which that court sustains a state statute against federal constitutional challenge, 28 U. S. C. §1257(2) (1964); the Court's jurisdiction to review cases in which a state court has rejected a federal constitutional claim not involving challenge to a state statute is limited to certiorari, 28 U. S. C. §1257(3) (1964). Under this pattern, there is all the more reason why a state criminal defendant who demonstrates that there exists a non-statutory bar to effective enforcement of his federal rights in the state courts should be permitted removal; unlike the defendant whose claim of deprivation of federal rights is directed against a state statute, he has no review as of right by this Court if he remains in the state system. (The workings of the Court's appeal and certiorari jurisdiction, dating from 1916, were given significant consideration in *Fay* v. *Noia*, 372 U. S. 391, 412-13 (1963), in applying 1867 habeas corpus legislation.)

more immune against appellate correction, as where state court hostility to a federal claim, or bias against its claimant, warp the process by which the facts underlying the claim are found. This is the case where local prejudice, local resistance, pitch the risk of error, always incident in fact finding,[144] strongly against federal contentions; it was to meet such situations that Congress had utilized removal prior to 1866[145] and utilized it in civil rights cases in and after that year.[146]

The construction put on the removal statute by the *Rives-Powers* line of cases, therefore, has no very evident credentials of history or reason. Nor are its credentials of authority much better. Beginning as an ambiguous observation in *Rives* (see pp. 75-76 *supra*), translated into rigid doctrine by a series of opinions which neither needed to discuss the question nor undertook to cast much illumination on it (see pp. 77-82 *supra*), and finally treated in *Powers* as long settled (see pp. 82-85 *supra*), the doctrine lacks the support of any single, decisive exposition by this Court. The Court's only attempts to explain it, in *Rives* and *Neal* v. *Delaware*, have consisted of the reasoning that (a) Congress, in authorizing removal before trial on a showing of denial or inability to enforce federal civil rights, must have meant by those terms some sort of denial or inability which could ordinarily be shown before trial; that (b) prior to state trial, a removal petitioner cannot ordinarily show that he will be denied or unable to enforce

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[144] See *Townsend* v. *Sain*, 372 U. S. 293, 312 (1963); *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411, 416-417 (1964).

[145] See pp. 39-44, *supra*.

[146] See pp. 44-68, 70-72, *supra*.

his federal civil rights in the state courts, unless those rights are explicitly repudiated by state legislation; *therefore* that (c) the denial or inability intended was a denial or inability occasioned by facially unconstitutional state legislation. Both premises of the syllogism are manifestly defective. The first ignores the circumstance that the statutory language "are denied or cannot enforce" derives from the 1866 act, which permitted removal both before and after state trial.[147] Omission of the post-trial removal provision in the 1875 Revised Statutes may have made the necessary showing of denial or inability more difficult by precipitating the time when denial or inability had to be shown, but it hardly provides a basis for inference as to what constitutes denial or inability. The second premise —that, absent legislation, it cannot be known what a state court will do—simply confounds the common law tradition and daily legal experience. *Strauder* had authorized removal on less than absolute certitude that federal civil rights would be denied—that is, notwithstanding the possibility that the West Virginia judges, obedient to the supremacy clause, would void unconstitutional state legislation. Surely the same degree of certitude is attainable in situations where no facially unconstitutional state legislation is involved.

If the *Rives-Powers* doctrine is explicable, it is so only as the resolution of an intensely practical difficulty. Whatever the original form of the removal statute, the statute as it came before the Court in *Rives* and later cases permitted removal exclusively before state trial. The difficulty lay in determining how a removal petitioner's denial of or

[147] See note 124 *supra*.

inability to enforce his federal civil rights could be litigated at this stage. Several alternatives were open to the Court. It might have said that the state courts would always be presumed responsive to their Supremacy Clause obligations, hence that no state defendant was denied his federal rights so long as those courts might entertain his claim for their vindication. This approach would read *Strauder* and the removal statute together off the books. It might have said that the federal district court to which removal was sought should take evidence on the issue of the actual probability that the state judges would disobey the supremacy clause—the probability, that is, that they would not fairly entertain defendant's federal claims. This approach would usually require an extended evidentiary hearing in the federal court on a complicated and speculative factual question—itself an undesirable practice for resolving a preliminary question of jurisdiction—and, in addition would plunge the federal judges into an embarrassing and politically unfeasible trial of the constitutional fidelity of their state counterparts. Or the Court might have said that a state litigation was removable whenever a federal civil rights issue could possibly arise in it and whenever the state judges could possibly resolve it wrongly against the defendant. This would have made the federal removal jurisdiction virtually coextensive with the state criminal process, and carried off many civil cases as well.

Faced with the various unpalatable alternatives, the Court seems to have hit upon an unsatisfactory but necessary compromise: removal was to be allowed whenever state courts would *probably* deny a federal civil right; but the sole acceptable—and at the same time wholly sufficient—showing of such probability was the existence of a facially

unconstitutional state statute. Protracted preliminary litigation of the jurisdictional question was thus avoided; trial of state judges by federal judges eschewed; some little piece of the civil rights removal statute preserved.

Defendants need not in this case ask reconsideration of the *Rives-Powers* compromise. For the compromise struck in those cases was struck with respect to a very different sort of federal civil right than they claim here. With monotonous sameness the cases from *Rives* to *Powers* are concerned with a single substantial federal right: the right against systematic discrimination in jury selection. That is a federal procedural guarantee, a right or immunity against a particular form of state judicial proceeding. By contrast, defendants here claim denial of a federal *substantive* right or immunity, an insulation against the underlying state criminal charge which is the basis of the prosecution. The difference between this case and *Rives-Powers* is critical for several reasons. Those reasons, we submit, compel the conclusion that defendants prosecuted for the exercise of the rights to equal public accommodations granted by the Civil Rights Act of 1964 may remove the prosecutions to a Federal District Court whether the statute under which they are charged violates those rights on its face or as applied.

First, the sort of procedural right involved in *Rives-Powers* is essentially a guarantee against *conviction* in a proceeding in which certain federally required procedures are not followed. The sort of substantive right involved here is a guarantee against *prosecution.* Section 201 of the Civil Rights Act of 1964 gives the defendants a right to equal service in places of public accommodation. Section 203 gives them a right against intimidation or coercion, punishment or any "attempt to punish" them in respect of

their exercise of rights under section 201. It is these rights which they claim they are denied and cannot enforce by reason of the pending state prosecution against them. These rights—unlike the *Rives-Powers* right against conviction without constitutional process—may be denied or rendered unenforcible by the very fact of prosecution, anterior to and irrespective of conviction. As the Fifth Circuit has said in a related context, under the Civil Rights Act of 1964 the defendants "simply may not be punished and prosecution is punishment." *Dilworth* v. *Riner*, 343 F. 2d 226, 231 (5th Cir. 1965).

The truth of the observation that prosecution for a federally protected act is punishment for that act should be obvious. Persons under prosecution are restrained of their liberty pending trial and appeal, or in the alternative compelled to post financial security for their appearance. If professional bonds are not available or availed of, their property or that of their friends and relatives is encumbered; if available and availed of, a defendant pays successive fines—in the form of irrecoverable bond premiums—as the cost of proceeding court by court until his federal claim is recognized. The defendant's time and money—if he has it—and those of his lawyers are eaten up by his defense. In the course of the proceeding, he is exposed to further risks of penalty by hostile courts: contempt proceedings for procedural defaults; perjury prosecutions whose success depends on trials of credibility. His misstep or his lawyer's in their progress through the criminal proceeding may default or forfeit his substantively valid federal claim; or that claim, valid in fact, may be destroyed by unsympathetic but unreviewable adverse fact-finding by the state courts. In any event, as unresolved criminal

charges hang over his head for years,[148] his mobility, acceptability at educational and other institutions (including the national armed services), eligibility for various state-conferred benefits, and willingness to risk the further displeasure of the state authorities are clogged.[149]

Second, as this last consideration makes evident, much more is involved in a prosecution aimed at conduct protected by substantive federal guarantees than the punishment of an individual defendant for a single past act or occurrence. The design and inevitable consequence of such a prosecution is to deter the defendant and all others like him from engaging in the sort of conduct with which he is charged—to "intimidate . . . or coerce" them, in the words of section 203 of the Civil Rights Act of 1964, from engaging in the conduct which it is the purpose of federal law to protect. In numerous contexts involving federal guarantees of personal freedoms, this Court has recognized that "The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions." *N.A.A.C.P.* v. *Button,* 371 U. S. 415, 433 (1963); see *Smith* v. *California,* 361 U. S. 147, 151 (1959); *Cramp* v.

[148] In February and March, 1964, the Supreme Court of Mississippi reached, and affirmed, convictions in harassment prosecutions arising out of the May, 1961 Freedom Rides. See *Thomas* v. *State,* 160 So. 2d 657 (Miss. 1964); *Farmer* v. *State,* 161 So. 2d 159 (Miss. 1964), and companion cases; *Knight* v. *State,* 161 So. 2d 521 (Miss. 1964). And more than another year was to pass before the Supreme Court of the United States reached, and reversed, these convictions. *Thomas* v. *Mississippi,* 380 U. S. 524 (1965). Compare *Edwards* v. *South Carolina,* 372 U. S. 229 (1963) (two years from arrest to Supreme Court reversal of conviction); *Fields* v. *South Carolina,* 375 U. S. 44 (1963) (three and a half years from arrest to Supreme Court reversal of conviction); *Henry* v. *Rock Hill,* 376 U. S. 776 (1964) (more than four years from arrest to Supreme Court reversal of conviction).

[149] See Amsterdam, note 142 *supra,* at 796-799.

Board of Public Instruction, 368 U. S. 278, 286-288 (1961); *Bantam Books, Inc.* v. *Sullivan*, 372 U. S. 58, 66-70 (1963); *Baggett* v. *Bullitt*, 377 U. S. 360, 378-379 (1964). Indeed, a cardinal objective of the criminal law is just this sort of general deterrence. Particularly during the pendency of a prosecution, the assertion of state prohibitive power which it embodies and advertises overhangs, threatens and represses conduct of the kind prosecuted. Federal protection of the conduct, if it is to be meaningful, must include protection against this repression. "The assumption that defense of a criminal prosecution will generally assure ample vindication of constitutional rights is unfounded in such cases." *Dombrowski* v. *Pfister*, 380 U. S. 479, 486 (1965).[150]

Congress, by the Civil Rights Act of 1964, has given Negroes the right to equal service in restaurants, the right to sit and eat in Leb's and in the Ship Ahoy of Atlanta. It has given them the right to enter, sit and eat without fear of prosecution or intimidation. It is these rights, not the right to have a trespass conviction reversed by the Supreme Court of Georgia or the Supreme Court of the United States long after they have been excluded from Leb's and from the Ship Ahoy which the present prosecutions threaten. It is these rights—unlike the rights of criminal procedure involved in the *Rives-Powers* decisions—which must be vindicated immediately, vindicated

[150] The cases cited in text all involve First Amendment freedoms which, as this Court has recognized, are freedoms of particular vulnerability and significance requiring extraordinary protection against repression. But Congress in the Civil Rights Act of 1964 has made the judgment that the rights to equal public accommodations protected by that act are similarly vulnerable and significant; hence, section 203 of the act, casting about them a broad range of insulation.

by entire insulation from the state criminal process, if they are to be vindicated at all. It is these rights, then, within the meaning of 28 U. S. C. §1443(1) which the defendants are denied and unable to enforce so long as the present prosecution persist unabated.

Third, where, as here, the federal rights claimed by state criminal defendants go to the very roots of their prosecution, not merely to its form, the State's interest in retaining the prosection within its own courts is inconsiderable. If this sort of federal right is to be made meaningful, the State must eventually relinquish or be deprived of the power to *begin* criminal proceedings which repress it. The *Rives-Powers* doctrine responds to concern with federal-state relations by refusing to deprive the state courts of competence over federal issues, even though they may decide those issues wrongly. To accept this response and to run the risk of error with respect to one sort of federal claim does not compel the same response, the same willingness to run the risk with respect to others. Federal substantive civil rights, federal immunities of personal liberty against prosection, can tenably be claimed in far fewer cases than federal procedural rights. Their removal therefore involves considerably smaller intrusion of federal power into the state criminal process. It involves no intrusion in matters of state judicial procedure itself, leaves the federal law regulating such procedure in the hands of the state courts in the first instance. That is consistent with the judgment made in *Rives* and *Powers* that the primary responsibility of the state courts for such matters of their own procedure is best left to them. The cases taken from their competence are only those which federal law has decreed should not be in court at all. And

these cases are, precisely, the cases in which the risk of state court error is most destructive of federal rights, because that risk not only jeopardizes the rights of the individual before the court but also—when taken into account by those who think of venturing to exercise their rights—serves as a substantial repressing force. It makes little difference to the state criminal defendant that his claim of Negro exclusion from the grand or petit jury is rejected by the trial judge, so long as it is accepted by this Court or by a post-conviction habeas corpus court. It makes a great deal of difference to the Negro deciding whether to enter Leb's in Atlanta whether he is hauled on trespass charges before the Superior Court of Fulton County or the United States District Court.

Fourth, the very arguments put forth in the *Rives-Powers* decisions to distinguish *Strauder* v. *West Virginia*, *supra*, point to the conclusion that a proper case for removal is stated by a defendant who asserts that the statute under which he is prosecuted is unconstitutional as applied to his conduct,[151] although not unconstitutional on its face. *Strauder*, concerned with the sufficiency of a pretrial showing of denial of or inability to enforce federal civil rights, held the showing sufficient where a state statute required jury discrimination, although it was not shown that the state courts would obey the statute in preference to the Constitution. *Rives* and its successors held a showing insufficient "where jury commissioners or other subordinate officers had, without authority derived from the Constitution and laws of the State, excluded colored citizens from

[151] The term "unconstitutional" as used in the text includes state statutes voided by the supremacy clause because in conflict with federal civil rights legislation.

juries because of their race." *Neal* v. *Delaware*, pp. 78-79, *supra*. The test of removability, then, based on the supposed degree of certitude with which it could be said before trial that the state courts would improperly reject a federal claim, was whether state statutory law directed the federally impermissible result complained of, so that that result was produced by statute and not simply by state judicial action unconstrained by the State's legislation. Under this test, it cannot matter whether the state statute involved is unconstitutional on its face (i.e., in all applications to a described class) or unconstitutional as applied (i.e., insofar as it condemns particular defendants' federally protected conduct). In both cases, equally, it is the statute which compels the state courts to the constitutionally unallowable result and thus brings it about that the defendant "cannot enforce in the courts of [the] . . . State" his federally protected rights. The critical characteristic of the *Rives-Powers* cases was not lack of a *facially* unconstitutional state statute, but lack of a statute which had anything to say about the constitutional denial whose future occurrence was the proffered basis for removal. The cases involved a matter of trial procedure unregulated by statute; in none of them did the defendant claim that the substantive criminal statute on which the prosecution was bottomed was invalid, either on its face or as applied, by reason of federal limitations on the kind of conduct which a State may punish. This latter sort of claim asserts that, under the Constitution, ***no matter what procedures may be forthcoming at trial,*** the State cannot constitutionally apply the statute relied on to the conduct with which the defendant is charged. *Neal* v. *Delaware* and subsequent cases explain the *Rives-Powers* line as holding that "since [the removal] . . . section only authorized a removal before trial, it did not

embrace a case in which a right is denied by judicial action during the trial . . . ." [152] But a defendant who attacks the underlying criminal statute as unconstitutional does not predicate his attack on "judicial action during the trial." He says that if he is convicted at all under the statute his conviction will be federally illegal. Nothing about his contention is contingent upon the nature of "judicial action, after the trial commenced . . . ." [153]

> When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of [present subsection 1443(1)]. . . . (*Virginia* v. *Rives*, 100 U. S. 313, 321 (1880).)

Since Georgia's prosecution of the defendants rests upon the theory that the Georgia trespass statute makes their conduct criminal, and since the Georgia trespass statute cannot make their conduct criminal consistently with the Civil Rights Act of 1964 and the supremacy clause under the

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[152] *Neal* v. *Delaware*, 103 U. S. 370, 386 (1881); see, e.g., *Gibson* v. *Mississippi*, 162 U. S. 565, 581 (1896).

[153] *Neal* v. *Delaware*, *supra* note 152 at 387. Of course, the state court *may* hold that the statute does not apply, or *may* hold it unconstitutional and enforce the defendant's federal claims. But it is always possible that a state court may do these things, and if the possibility precludes removal, the removal statute is read entirely off the books. This would require repudiation of Strauder, and rejection of the assumption on which the *Rives-Powers* line of cases was decided: that if an unconstitutional state statute were found, removal would be proper.

circumstances alleged in their removal petition,[184] Georgia's statute—whether or not unconstitutional in other applications—denies defendants' right within the meaning of *Rives* and §1443(1).

What has already been said is sufficient to answer Georgia's alternative argument (Br. 51-54) that removal under §1443(1) is unavailable unless the defendants demonstrate that the Georgia courts will not fairly entertain their federal claim. Acceptance of this argument would require overruling *Strauder* v. *West Virginia*. It would also require that a federal district judge, on petition for removal, try the constitutional fidelity of the state judiciary. This is inconceivable. The present case demonstrates the difficulty. If the district court below were required to try the Georgia courts, it could hardly stop with the *Bolton* opinion of the Georgia Supreme Court, described at pp. 52-54 of Georgia's brief. It would have to make a somewhat more searching inquiry to discover whether—whatever the attitude of the Supreme Court of Georgia—Judge Durwood T. Pye has acquiesced in this Court's *Hamm* decision. Compare this Court's decision in *Walker* v. *Georgia*, 381 U. S. 355 (1965), with Judge Pye's order on remand, set out at App. 4a-7a. It would have to evaluate Judge Pye's demonstrated attitude in other civil rights matters as a basis for prediction of his probable fairness in this case. See Galphin, *Judge Pye and the Hundred Sit-Ins*, 150 The New Republic 8 (No. 22, Issue 2584, May 30, 1964). It would have to similarly evaluate Judge Pye's attitude toward the present case, as evidenced by his orders and opinions set out in the Appendix to Brief for Respondents *Rachel et al., Georgia* v. *Tuttle*, 377 U. S. 987 (1964). Such an inquiry is palpably impossible.

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[184] See Part III *infra*.

2. *Persons Prosecuted for Exercising Their Right to Equal Public Accommodations Under the Civil Rights Act of 1964 Are Thereby Prosecuted for an Act Under Color of Authority Derived From the Civil Rights Act, Within the Meaning of §1443(2).*

If this Court agrees with the construction of §1443(1) by the court of appeals, no question regarding §1443(2) need be reached. As an alternative ground for affirmance of that court's judgment, however, defendants submit that their petition for removal ought be held sufficient under the latter subsection. Their position, simply, is that a state criminal defendant charged with an offense for an act in the exercise of his right to equal public accommodations given by section 201 of the Civil Rights Act of 1964 is thereby prosecuted "For [an] . . . act under color of authority derived from" section 201, within the meaning of §1443(2). As Georgia notes (Br. 44-46), the Court of Appeals for the Fifth Circuit, which did not reach the issue in the present case, has since decided it adversely to defendants' contention, in part on the ground that §1443(1), construed as the Fifth Circuit construes it, "is an adequate vehicle for the protection and vindication of the rights of [removal petitioners] . . . ," *Peacock* v. *City of Greenwood*, 347 F. 2d 679, 686 (5th Cir. 1965). Should this Court reverse the Fifth Circuit's construction of §1443(1), ample scope must be given §1443(2) in order to realize the removal statute's protective purposes.

Georgia urges on the Court (Br. 44-46) the *Peacock* construction of §1443(2), which limits removal under that subsection to "federal officers and those assisting them or otherwise acting in an official or quasi-official capacity." 347 F. 2d at 686. "Color of authority" is thus read to mean "color of office." Georgia also relies (Br. 40-42) upon the

construction given §1443(2) by *New York* v. *Galamison*, 342 F. 2d 255 (2d Cir. 1965)—although the reliance is rendered more than a little precarious by the Second Circuit's explicit distinction of public accommodations cases like the present one, whose removability under §1443(2) the court leaves open. See 342 F. 2d at 265, 271.[155] The *Galamison* construction, in essence, holds that an act is done under color of authority derived from federal law providing for equal civil rights only if federal civil rights law *commands* that the act be done, as distinguished from commanding that the actor be left free to do it. Both *Peacock* and *Galamison*, however, take an inappropriately narrow view of §1443(2).

The subsection authorizes removal of prosecutions "For any act under color of authority derived from any law providing for equal [civil][156] rights." As a matter of language, this might cover (i) only federal officers enforcing laws providing for equal civil rights; or (ii) federal officers enforcing such laws and also private persons authorized by the officers to assist them in enforcement; or (iii) the preceding class and also all persons exercising privileges or immunities under such laws.[157] Construction (i) is shortly

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[155] The quotation from the *Galamison* opinion at Br. 40-41 is misleading in suggesting that the Second Circuit would have relegated removal petitioners who—like defendants here—invoked the Civil Rights Act of 1964 to the exclusive protection of §1443(1). The quoted passage does distinguish the showings needed for removal under subsections (1) and (2) respectively of §1443, but in other passages the court reserves the question whether petitioners like the present defendants are entitled to removal under subsection (2). See pages cited in text.

[156] See note 142 *supra*.

[157] Private persons not authorized by federal officers to enforce federal laws could not claim "color of authority derived from" such laws in any other manner than by exercising privileges or immunities given them by the laws.

disposed of: the Civil Rights Act of 1866 allowed removal of suits and prosecutions "against any officer, civil or military, *or other person,* for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from . . . " the act or the Freedmen's Bureau legislation;[158] this "officer . . . or other person" formula survived successive codifications[159] until 1948; all words limiting the nature or character of the petitioner were then dropped, the reviser's note disclaiming substantive change.[160]

Three technical considerations support rejection also of alternative construction (ii). First, the "color of authority" clause of the 1866 act applied to "persons" without explicit limitation to persons acting under federal officers. The same Congress which passed the act put such an explicit limitation in the "authority" clause of the revenue-officer removal statute of that year.[161] Second, the "color of authority" provision of 1866 was carried forward with the "denial" provision in section 641 of the *Revised Statutes.* Other removal provisions applying to federal officers and persons acting under them—including the provisions of the 1871 amendatory act to the Second Civil Rights Act—were carried forward in section 643. This is some evidence of a relatively contemporary understanding that, unlike the section 643 provisions, the "color of authority" clause of the civil rights removal section applies to persons who are neither federal officers nor acting under federal

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[158] The statute is set out in the text at pp. 55-56, *supra.*

[159] See Rev. Stat. §641 (1875); Judicial Code of 1911, ch. 231, §31, 36 Stat. 1096.

[160] See p. 70, *supra.*

[161] See p. 44, *supra.*

officers. Finally, evidence of a similar congressional understanding is seen in the continuation of the civil rights "color of authority" provision in subsection 1443(2) in 1948. The 1948 revision of Title 28 of the United States Code expanded the earlier revenue-officer removal statutes to cover in section 1442(a)(1) all suits or prosecutions against any federal "officer . . . or person acting under him, for any act under color of such office." If subsection 1443(2) reaches only federal officers and persons acting under them, it is wholly tautological in the 1948 Code.

This last consideration does not suggest attributing to the Code revision any purpose to change the meaning of the law. But in view of the ambiguities in language and history of prior law, the desirability of giving subsection 1443(2) some meaningful place in the context of present judiciary legislation does strongly support construction (iii). More important, construction (iii) is supported by the context of the Civil Rights Act of 1866.

Unlike the Habeas Corpus Suspension Act of 1863, on whose language the "color of authority" clause of 1866 was modeled,[162] the 1866 act granted extensive private privileges and immunities, including some whose exercise would foreseeably provoke state law charges of trespasses and wrongs. Section 1, for example, gave all citizens the equal right to acquire and hold real and personal property and to full and equal benefit of all laws for the security of persons and property. In the exercise of ordinary self-help measures to defend their property or resist arrest under the discriminatory Black Codes, freedmen asserting their equal rights under these sections would likely commit acts for which

[162] See p. 43, *supra*.

they might be civilly or criminally charged in the state courts.

The "color of authority" clause of the removal section, present subsection 1443(2), covers such cases in terms. By the clause Congress seems to have meant to authorize removal of cases of this sort without requiring the state defendant to demonstrate in addition that he was denied or could not enforce his equal civil rights in the state courts, within the meaning of the "denial" clause which is now subsection 1443(1). The reason why "denial" was not demanded in subsection (2) cases is apparent. While subsection (1) protects all federal civil rights, substantive and procedural, subsection (2) isolates and separately treats cases involving substantive federal claims. In such cases, as defendants have shown at pp. 95-103 *supra*, there was and is a particularly imperative need for immediate and noncontingent federal jurisdiction and for the confidence given by the assurance of such a jurisdiction, lest exercise of the federally guaranteed substantive rights be deterred by fear that those rights may later have to come to the test in an unsympathetic state court. Like the right of equal public accommodations given by the Civil Rights Act of 1964, the privileges given the freedmen in 1866 to have an equal enjoyment of property and to move about unconstrained by racially discriminatory regulations[163] would have been seriously impaired if the freedmen had thought that they could be haled before the state courts in the first

[163] One of the clear purposes of the 1866 act was to assure the freedmen the freedom of movement which they were denied the "pass" system of the Southern States. Senator Trumbull persistently recurred to the evils of the "pass" system, in debate on the civil rights bill, CONG. GLOBE, 39th Cong., 1st Sess. 474 (Jan. 29, 1866), 1759 (April 4, 1866), and on the amendatory freedmen's bureau bill, *id.* at 941 (Feb. 20, 1866).

instance on charges of exercising those freedoms. Exercise of the freedoms must have been within congressional contemplation an act "under color of authority" of the Civil Rights Act.

This is to say that any act which is *protected* by a law providing for equal civil rights is an act done "under color of authority derived from" the law. Such a view rejects *Peacock's* equation of "authority" with "office" and leaves no room for the construction advanced in *Galamison* that federal civil rights law must "direct" the actor to act. Judge Friendly, writing for the majority in *Galamison*, concluded that, in order for a law to provide an actor "color of authority," that law must "direct" or "encourage" him to act. Assuming that a private individual not acting under a federal officer might sometimes be given "color of authority" by federal law, Judge Friendly insisted that this could be so only if such a private individual could "point to some law that directs or encourages him to act in a certain manner, not merely to a generalized constitutional provision that will give him a defense or to an equally general statute that may impose civil or criminal liability on persons interfering with him." 342 F. 2d at 264. Judge Marshall (as he then was) disagreed with the majority's test of "color of authority." Dissenting, he stated his own test: "Any individual acts under 'color of authority' of a law at least when his conduct is protected by that law, when interferences with that activity are unlawful and the subject of civil or criminal legal remedies." 342 F. 2d at 276. He reasoned that the most familiar technique for encouraging certain private activity was to provide protection for that activity or to make interferences with the activity unlawful. *Ibid.* His position seems plainly correct.

To support its construction, the *Galamison* majority said that "color of authority" in subsection 1443(2) must have a narrower meaning that "a right under" in subsection 1443(1), "since otherwise, in almost all cases covered by the first clause . . . , the requirement of showing denial or inability to enforce would be avoided by resort to the second." 342 F. 2d at 264. But under any construction of "color of authority," subsection (2) has a narrower reach than subsection (1); the "act" requirement of subsection (2) limits that subsection to cases presenting *substantive* federal claims. The court's argument therefore has several weaknesses. First, its phrase "almost all cases" makes the extraordinarily implausible assumption that the incidence of colorable substantive federal civil rights claims far outstrips the incidence of colorable procedural claims. Second, subsection (2) appears to be designed precisely to avoid "the requirement of showing denial or inability to enforce" in the case of substantive claims—and for good and sufficient reason. Third, as Judge Marshall persuasively points out, the majority's insistence on a statutory directive wholly defeats its assumption that subsection 1443(2) may reach private, unofficial action. Id. at 277. No federal law providing for equal civil rights (however that phrase be construed) *directs* anyone other than a federal officer to do a protected act. Hence, the conclusion that §1442 reaches private individuals in any case compels a conception of "authority" within that subsection as "authorization," "license," "protection"—entirely natural meanings of the term. The majority also says that, because in the cases "at which §1443(2) was primarily aimed and to which it indubitably applies—acts of officers or quasi-officers"—the removal petitioner would have acted "on a specific statute or order telling him to act," a "private per-

son claiming the benefit of §1443(2) can stand no better . . ." 342 F. 2d at 264. Again Judge Marshall's response is compelling: "The manner in which a private person acts under the authority of a law need not be the same as that of an officer." *Id.* at 276. The law applies to each according to his nature; the assumption or conclusion that it applies to private individuals at all precludes the holding that it applies only when a private individual meets some condition which private individuals never meet.

The trouble with both the *Peacock* and *Galamison* readings of "color of authority" is that they largely render §1443(2) a dead letter. The subsection might indeed be relatively unimportant if ample scope were given §1443(1). But Georgia's position here nullifies that subsection as well and thereby relegates civil rights removal to the ash heap. Defendants submit this would be intolerable.

Instructed by bitter experience that the state courts could not and would not be the efficient organs for vindicating federally guaranteed civil rights—that, to the contrary, they could and would be instruments for the destruction by harassment of the previous liberties secured by battle and the post-Civil War amendments—the Reconstruction Congresses did no vain act in the creation of the federal civil rights removal jurisdiction. That jurisdiction responded, basically, to two critical concerns. First, the same Congresses which made a high national commitment to protect individual freedom and equality against the States knew that federal fact-finding forums were absolutely indispensable to the effective enforcement of those guarantees.[164]

[164] See *Townsend* v. *Sain*, 372 U. S. 293, 312 (1963); cf. *England* v. *Louisiana State Board of Medical Examiners*, 375 U. S. 411 (1964).

Second, those Congresses well understood that immediate, undelayed enforcement was imperative if the guarantees were to survive.[165] These concerns are equally compelling today. Federal guarantees of civil rights, turning as they ordinarily do upon contested issues of fact, will be of only academic value to the citizen unless the facts are found in a federal tribunal.[166] And delays of the sort customary to the heavy-handed state criminal process—delays of years, coupled with the onerous burdens and perilous vicissitudes of litigation in the state courts—threaten to annihilate the promised freedoms and convert eternal liberties into eternal lawsuits. Meanwhile, those persons who dare to exercise their rights are fettered with the clogs of pending prosecutions, while others—threatened with the same fate—forego even the attempt at freedom.

Repression of precious federal rights is no new or fleeting phenomenon. Repression is endemic to the popular, localized, politics-dominated state criminal administration. Today, as in Reconstruction times, those who control the state criminal process are "harassing, annoying and even driving out of the State" [167] persons to whose safe conduct the national faith is pledged. There are thousands of such harassment prosecutions in the South today. There are fewer outside the South, but not few. Today the defendants are Negroes. Thirty years ago they were Jehovah's Witnesses or labor union organizers. Sixty, Orientals on the

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[165] See *Dombrowski* v. *Pfister*, 380 U. S. 479 (1965); *Baggett* v. *Bullitt*, 377 U. S. 360 (1964); *Freedman* v. *Maryland*, [illegible] U. S. 51 (1965); cf. *Monroe* v. *Pape*, 365 U. S. 167 (1961), *McNeese* v. *Board of Education*, 373 U. S. 668 (1963).

[166] See, e.g., *Fe[illegible]* v. [illegible] *ork*, 340 U. S. 315 (1951).

[167] Cong. Globe, 39th Cong., 1st Sess. 1526 (March 20, 1866) (remarks of Representative McKee, of Kentucky).

Coast. Before that, the Unionists, the Cherokees, the Freedmen—history has followed one such group with another. And if the past is prelude, the probability is strong that the popular organs of state prosecution will never effectively protect federal civil liberties: that they will remain, rather, weapons of harassment, not vindication, of persons who exercise the unpopular rights which the Constitution gives.

Yet, the right to live free of racial discrimination must be not merely the right to have one's state conviction for attempting to exercise that right eventually overturned by this Court on direct review or by a federal court exercising post-conviction habeas corpus jurisdiction. The right to equal public accommodations must be not merely the right to secure a favorable federal ruling some years later. If these rights are to be anything more than paper rights they must be exercisable free of state interference in the real world; and such interference must be stopped as soon as it begins. That is the basic justification of a federal civil rights removal jurisdiction. State harassment works, for the most part, not by final judgments of conviction but by mesne process. It can be stopped only by a federal anticipatory jurisdiction as broad as the evil itself. Although federal trial procedure guarantees may be vindicated at the conclusion of state process, the power of repression by mesne process allows no such accommodation in the case of substantive guarantees. When individuals are prosecuted for their exercise of federally guaranteed freedoms—when they are prosecuted, in the words of §1443(2), for acts under color of authority of federal civil rights law—then the respective interests of the Nation and the States can be reconciled only by federal intervention at the outset of the prosecution.

III.

Defendants' Removal Petition Was Not Deficient as a Pleading.

If defendants are correct in the view they take of either §1443(1) or §1443(2), their prosecutions are removable on a showing, without more, that they are being prosecuted for attempting to exercise their rights to equal public accommodations under the Civil Rights Act of 1964. This requires that they allege (and prove if the allegations are contested)[168] that they are being prosecuted (a) for trespass for refusing to leave (b) establishments covered by the public accommodations title of the Civil Rights Act of 1964, (c) where they were excluded and consequently prosecuted by reason of race.[169]

The petition adequately alleges these three elements. It states that the defendants have been indicted under, and are presently charged with violations of, GA. CODE ANN.

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[168] Defendants take pp. 47-50 of Georgia's Brief to mean that no hearing was required on the present removal petition because the facts alleged were insufficient if true to support removal—just as, in a civil action, a complaint may be dismissed without evidentiary hearing for failure to state a claim within the jurisdiction of the court. It is hard to conceive that Georgia is asserting also the converse of this proposition: that if the allegations are sufficient they are not subject to denial and removal is allowed without inquiry into their truth where disputed. Defendants would be advantaged by such a rule in this case, but hardly think themselves entitled to it. Rather, it seems obvious that controversies as to facts pertinent to removability must be in some manner resolved by the district court, whether on affidavit, evidentiary hearing or other method of trying facts.

[169] All of the other sorts of allegations which Georgia says defendants' removal petition lacks (Br. 30-31) are immaterial if this Court agrees with defendants' construction of the removal statute.

§26-3005, Georgia's 1960 refusal-to-leave statute (R. 1-4). It states that defendant Rachel and some of the other defendants "were arrested . . . when they sought to obtain service, food, entertainment and comfort at Lebco, Inc., d/b/a Leb's, a privately owned restaurant opened to the general public, 66 Luckie Street, Atlanta, Fulton County, Georgia" (R. 2). Similarly, for each defendant other than Rachel and his companions, the petition states that he or she was arrested while seeking service at a named restaurant, cafeteria or hotel, opened to the general public (R. 2-3). A street location which the district court could notice was in downtown Atlanta was given for each establishment except the Henry Grady Hotel, and that was alleged to be "built on real estate owned by the State of Georgia but leased for a term of years to the H. & G. Hotel Corporation." (*Ibid.*) These arrests "were effected for the sole purpose of aiding, abetting and perpetuating customs, and usages which have deep historical and psychological roots in the mores and attitudes which exist within the City of Atlanta with respect to serving and seating members of the Negro race in such places of public accommodation and convenience upon a racially discriminatory basis and upon terms and conditions not imposed upon members of the white or Caucasian race" (R. 1). And "the State of Georgia by statute, custom, usage, and practice supports and maintains a policy of racial discrimination" (R. 4).

Trespass prosecutions for refusal to leave restaurants at which the defendants were refused service on account of race are plainly alleged.[179] The only regard in which the

[179] Georgia contends at Br. 41-42 that the allegation that "Members of the so-called white or Caucasian race are similarly treated [i.e., treated as are Negroes] and discriminated against when accompanied by members of the Negro race" (R. 1-2) is in effect

allegations might be challenged relates to their sufficiency in alleging coverage of the restaurants by the public accommotions title of the 1964 act. Failure in terms to allege coverage is not surprising, of course, inasmuch as the petition predated the 1964 act; and if the facts set forth did not sufficiently allege coverage, the supervention of the act would plainly warrant this Court's remand of the case to the district court to permit amendment. 28 U. S. C. §2106 (1964); cf. *Maryland* v. *Soper* (No. 1), 270 U. S. 9, 36 (1926). But the facts appear sufficient. It is incredible to suppose that any restaurant in downtown Atlanta, opened to the general public, is not one which "serves or offers to serve interstate travelers," within sections 201(b)(2), (c)(2) of the act. See *Hamm* v. *City of Rock Hill*, 379 U. S. 306, 309-310 (1964). Additionally, the allegations that defendants were arrested for the sole purpose of aiding customs of racial discrimination and that the State of Georgia supports and maintains a policy of racial discrimination bring the case within sections 201(b), (d)(2), as one in which discrimination "is carried on under color of any custom or usage required or enforced by officials of the State or political subdivision thereof"—particularly as to the Henry Grady Hotel, which is alleged to occupy state-owned land. If Georgia seriously disputes coverage in this Court, defendants would not object to the Court's leaving the matter for amendment and hearing on the remand ordered by the court of appeals. See Part IV *infra*. If not, the matter seems an academic quibble.

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an allegation that Negroes and whites are similarly treated in Atlanta. This is bizarre. Defendants think it indisputable that a white man excluded from a covered establishment on the sole ground that he is accompanied by a Negro is thereby discriminated against "on the ground of race" within section 201(a) of the Civil Rights Act of 1964.

Under 28 U. S. C. §1446(a) (1964), a removal petition is required to contain "a short and plain statement of the facts which entitle [the petitioner] . . . to removal." This provision, enacted in the 1948 Judicial Code revision to unify and simplify the statutory provisions theretofore governing procedure in invoking the various heads of federal removal jurisdiction, adopts the practical and non-technical approach to pleading previously taken by this Court in promulgating FED. RULE CIV. PRO. 8(a).[171] Pre-1948 decisions requiring great specificity and detail in criminal removal petitions under the old statutes, see *Maryland* v. *Soper* (No. 1), 270 U. S. 9 (1926); *Colorado* v. *Symes*, 286 U. S. 510 (1932), have no application under §1446(a), which governs alike civil and criminal cases.[172] Given the few, simple facts required to sustain removal under proper construction of §1443, defendants' petition would probably pass muster even under the old pleading requirements. Under present §1446(a), the sufficiency of the petition should be clear.

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[171] In pertinent part, FED. RULE CIV. PRO. 8(a), promulgated by this Court to take effect in 1938, provided (and still provides): "A pleading which sets forth a claim for relief . . . shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends . . ., (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief to which he deems himself entitled."

[172] The statute under which *Soper* and *Symes* were decided, Judicial Code of 1911, ch. 231, §33, 36 Stat. 1097, as amended by Act of August 23, 1916, ch. 399, 39 Stat. 532-533, 28 U. S. C. §76 (1940), provided in pertinent part: "Said petition shall set forth the nature of the suit or prosecution and be verified by affidavit and, together with a certificate signed by an attorney . . . stating that, as counsel for the petitioner, he has examined the proceedings against him and carefully inquired into all the matters set forth in the petition, and that he believes them to be true, shall be presented to the said district court . . . ."

IV.

The Court of Appeals' Directions Governing Hearing on Remand Were Proper.

Under proper construction of 28 U. S. C. §1443, Georgia's contention that the court of appeals should have directed the district court on remand to inquire whether the "Georgia Courts will not apply *Hamm* fairly" (Br. 52) must be rejected. Fairness of the state courts in entertaining defendants' federal claim is not in issue. See p. 103 *supra*.

There remain Georgia's contentions that the court of appeals should have left open on remand (1) the issue whether the restaurants in which defendants were arrested were covered by the public accommodations title of the Civil Rights Act of 1964, and (2) the issue of "violence or vandalism" by defendants which, Georgia says, would take them out of the protection of *Hamm* (Br. 51-52). As to the first issue, it should be noted that Georgia's brief carefully avoids asserting that there is any real question of coverage of the restaurants. The court of appeals' direction to the district court to try the issues "as to the purpose for the arrests and prosecutions, and in the event it is established that the removal of the [defendants] . . . from the various places of public accommodation was done for racial reasons," to accept jurisdiction (R. 31-32), doubtless uses the phrase "places of public accommodation" in its statutory sense. Therefore, if Georgia should represent to this Court that it seriously means to contest coverage, defendants would have no objection to the Court's making clear in its opinion that it construes the remand direction as leaving the question of coverage open. As for the issue of "violence or vandal-

ism," Georgia misreads the court of appeals' opinion. That court has instructed the district court to inquire whether defendants were excluded from service in the restaurants "for racial reasons." If they were, the question of violence or vandalism is simply not in the case. The Civil Rights Act of 1964, of course, permits a restaurateur to deny service to vandals because they are vandals, and so does the court of appeals' judgment. Neither allows the restaurateur to deny service "for racial reasons." That is properly the issue on remand.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals for the Fifth Circuit should be affirmed.

Respectfully submitted,

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APPENDIX

Motion for Stay Pending Appeal
Filed March 12, 1964

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. .....

THOMAS RACHEL, et al.,

Appellants,

—v.—

THE STATE OF GEORGIA,

Appellee.

Appellants respectfully move this Court for a stay of further proceedings and for a stay of the prosecution of the criminal cases against them presently pending in the Superior Court of Fulton County, Georgia, in the matters individually entitled State of Georgia v. Thomas Rachel, Jerry Walker, Larry Crawford Fox, Debbie Amis, Willie Paul Berrien, Jr., Lynn Pfuhl, Michael Sayer, Julian M. Samstein, Ralph M. Moore, Ronald Franklin Turner, Carl C. Arnold, James F. Thompson, Archer Columbus Black, Carl Vincent Hill, Jeanette Stockton Hume, James Arthur Cherry, Russell C. Campbell, Allen R. Elliott, Anna Jo Weaver, and Charles Edward Wells. These prosecutions should be stayed pending hearing and determination

of petitioners' appeal herein from the order of Judge Boyd Sloan remanding said matters to the aforesaid state court after they had been removed to the United States District Court for the Northern District of Georgia, Atlanta Division.

Appellants respectfully show that some eighteen (18) defendants who are on the same Calendar in the Criminal Division of the Fulton Superior Court and who are charged with the same misdemeanor offense as the appellants, were ordered to show cause before the said trial judge at 9:30 A.M., Thursday, March 12, 1964, as to why their bonds should not be increased and, also, as to why they should not be required to give further surety. Though only one of the appellants had his bond increased from $500.00 to $7,000.00, the appellants stand threatened with the immediate prospect of their bonds being so raised and with their being required to give further security. That should such demands be made upon the appellants, many of them would be required to remain in jail because of their inability to make said bond; also, as a result of such incarceration, the appellants would have the effectiveness of their right to counsel substantially minimized.

Had the Honorable Judge Sloan granted the appellants a hearing prior to remanding the subject cases, appellants would have been able to show facts at the hearing sustaining the allegations of their removal petition sufficiently to justify the exercise of the jurisdiction of the said Court to hear and try the indictments pending in the state court against the appellants.

The matters will be tried in the immediate future by the Honorable Durwood T. Pye, Judge, Fulton Superior Court, unless the proceedings are stayed pending a hearing in this matter, otherwise the issues raised and to be raised herein will become moot.

In view of the fact that criminal prosecutions which appellants seek to stay prevents them from exercising the rights, privileges and immunities of United States citizens under the United States Constitution and Laws, appellants make the following requests in connection with this motion:

A. That the Court by one of its Judges, issue the requested stay forthwith and on the basis of the record herein.

B. If the Court deems it improper to determine this motion by one of its judges that the Court, by a three judge panel, issue the requested stay forthwith and on the basis of the record herein.

C. Whether the Court is to determine this motion by one of its judges or by a three-judge panel, and if the Court is not to determine the motion on the basis of the record herein, that the Court set down the motion for argument on the shortest possible notice that the Court deems proper in the premises, and grant leave to defendants to serve notice of argument on plaintiffs by telephone, telegraph, or any other proper and expeditious means.

To expedite the proceedings a copy of the petition for removal and remand order are attached hereto as exhibits "A" and "B" respectively.

This 12th day of March, 1964.

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859½ Hunter St., N.W.
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JA. 5-8372

Order and Judgment on Remitter

CASE NUMBER 85028

INDICTMENT FOR MISDEMEANOR

TRUE BILL RETURNED BY THE GRAND JURY
ON JANUARY 28, 1964

FULTON SUPERIOR COURT

THE STATE

VERSUS

MARDON R. WALKER

The remitter of the Honorable Supreme Court of Georgia in the above stated case has been filed in the Office of the Clerk of this court, as follows, to-wit:

> This case came before this court upon a writ of error from the Superior Court of Fulton County; and, after argument had, it is considered and adjudged that the judgment of the court below be reversed for the reason stated in the opinion this day filed.

Accompanying the remitter is said opinion of the Supreme Court of Georgia, as follows, to-wit:

> 22656. MARDON R. WALKER v. THE STATE
>
> MOBLEY, Justice. Whereas the Supreme Court of the United States did by judgment of that court entered on May 24, 1965, reverse the judgment of this court

in *Walker* v. *State,* 220 Ga. 415 (139 SE2d 278), wherein this court had affirmed the judgment of the Superior Court of Fulton County convicting the defendant of a misdemeanor, to-wit, the violation of the anti-trespass law (Ga. L. 1960, p. 142, *Code Ann.* Section 26-3005) of this state, the judgment of this court is vacated and the judgment of the trial court is reversed.

Judgment Reversed. All the Justices Concur.

Upon examination of the decision of the Supreme Court of Georgia reported at 220 *Georgia* 415, it appears that the rulings of this Court denying the plea in abatement were held correct, that it was held that the motion in arrest of judgment raised no question for consideration, and that it was further held that the motion for new trial was properly overruled. It also appears that the Supreme Court of Georgia further ruled, in headnote five of said opinion, as follows, to-wit:

5. This court has no original jurisdiction and is limited to the trial and correction of errors of law from the superior courts and other enumerated courts of this State. *Code Ann.* Section 2-3704. Thus the contention made in the general grounds of the motion for new trial that the enactment into law of the Civil Rights Act of 1964 by the Congress abates defendant's conviction and prevents her punishment for violating the Georgia anti-trespass Act raises no question for consideration by this court, as this question was not raised or passed upon in the trial court.

Upon examination of the decision of the Supreme Court of the United States entered May 24, 1965, reported in

Supreme Court Reporter, Volume 85, Number 15, for June 15, 1965, at page 1557, it appears that upon consideration of the petition for certiorari filed in the Supreme Court of the United States to the Supreme Court of Georgia it was ordered by the Supreme Court of the United States that said petition for certiorari be granted and that the judgment of the Supreme Court of Georgia be reversed. It further appears that dissenting from this order were Mr. Justice Stewart, Mr. Justice Black, Mr. Justice Harlan, and Mr. Justice White.

Upon receipt of the aforesaid remitter in this court, said case is now in the following posture: The conviction of defendant, Mardon R. Walker, in this court has been ordered reversed by the Supreme Court of Georgia by reason of the reversal of its affirmance thereof by the Supreme Court of the United States.

The rulings and judgments of the Supreme Court of Georgia and the Supreme Court of the United States do not extend beyond this. No question as to the effect of the Civil Rights Act of 1964 enacted by the Congress has been made by either the Supreme Court of Georgia or the Supreme Court of the United States by any judgment in relation to this case. Indeed, no such ruling could be made for no issue in that regard was before this Court, and the Supreme Court of Georgia was without jurisdiction to pass thereon and the Supreme Court of the United States, likewise, was without jurisdiction as to any such matter which was not in issue in the case.

While previous rulings of the Supreme Court of the United States were cited by the majority of that court in its opinion reversing the decision of the Supreme Court of Georgia, said citations of authority do not constitute rul-

ings or judgments and in no way serve to constitute any adjudication in this case with reference to the aforesaid Civil Rights Act of 1964 enacted by the Congress of the United States in that year.

The case thus before this Court is simply one in which the conviction of defendant, Mardon R. Walker, under the indictment against her in this court has been set aside and reversed, and the result is that the case stands for trial upon said indictment de novo in this court.

It is, therefore, considered, ordered, and adjudged by the Court that the aforesaid conviction of Mardon R. Walker be, and the same is hereby set aside, and a new trial is granted her upon said indictment.

This, the 28th day of July, 1965.

DURWOOD T. PYE
Judge, Superior Court
Atlanta Judicial Circuit

SUPREME COURT OF THE UNITED STATES

No. 147.—October Term, 1965.

State of Georgia, Petitioner, v. Thomas Rachel et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 20, 1966.]

Mr. Justice Stewart delivered the opinion of the Court.

This case presents questions concerning the scope of a century-old federal law that permits a defendant in state court proceedings to transfer his case to a federal trial court under certain conditions. That law, now 28 U. S. C. § 1443, provides:

"§ 1443. *Civil rights cases.*

"Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending:

"(1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;

"(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law."

The case arises from a removal petition filed by Thomas Rachel and 19 other defendants seeking to transfer to the United States District Court for the Northern District of Georgia criminal trespass prosecutions pending against them in the Superior Court of

Fulton County, Georgia. The petition stated that the defendants had been arrested on various dates in the spring of 1963 when they sought to obtain service at privately owned restaurants open to the general public in Atlanta, Georgia. The defendants alleged:

> "their arrests were effected for the sole purpose of aiding, abetting, and perpetuating customs, and usages which have deep historical and psychological roots in the mores and attitudes which exist within the City of Atlanta with respect to serving and seating members of the Negro race in such places of public accommodation and convenience upon a racially discriminatory basis and upon terms and conditions not imposed upon members of the so-called white or Caucasian race. Members of the so-called white or Caucasian race are similarly treated and discriminated against when accompanied by members of the Negro race."

Each defendant, according to the petition, was then indicted under the Georgia statute making it a misdemeanor to refuse to leave the premises of another when requested to do so by the owner or the person in charge.[1] On these allegations, the defendants maintained that removal was authorized under both subsections of 28 U. S. C. § 1443. The defendants maintained broadly that they were entitled to removal under the First Amendment and the Due Process Clause of the Four-

[1] The statute under which the defendants were charged, Ga. Code Ann. § 26-3005 (1965 Cum. Supp.), provides:

"*Refusal to leave premises of another when ordered to do so by owner or person in charge.* It shall be unlawful for any person, who is on the premises of another, to refuse and fail to leave said premises when requested to do so by the owner or any person in charge of said premises or the agent or employee of such owner or such person in charge. Any person violating the provisions of this section shall be guilty of a misdemeanor and upon conviction thereof shall be punished as for a misdemeanor."

teenth Amendment. Specifically invoking the language of subsection (1), the "denied or cannot enforce" clause, their petition stated:

> "petitioners are denied and/or cannot enforce in the Courts of the State of Georgia rights under the Constitution and Laws of the United States providing for the equal rights of citizens of the United States . . . in that, among other things, the State of Georgia by statute, custom, usage, and practice supports and maintains a policy of racial discrimination."

Invoking the language of subsection (2), the "color of authority" clause, the petition stated:

> "petitioners are being prosecuted for acts done under color of authority derived from the constitution and laws of the United States and for refusing to do an act which was, and is, inconsistent with the Constitution and Laws of the United States."

On its own motion and without a hearing, the Federal District Court remanded the cases to the Superior Court of Fulton County, Georgia, finding that the petition did not allege facts sufficient to sustain removal under the federal statute. The defendants appealed to the Court of Appeals for the Fifth Circuit.[2]

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[2] We reject the State's contention that the appeal was untimely. The notice of appeal was filed 16 days after the order of remand. Although Rule 37 (a) (2) of the Federal Rules of Criminal Procedure requires that an appeal be taken within 10 days after entry of the order appealed from, that rule does not govern an appeal taken prior to verdict, finding of guilty or not guilty by the court, or plea of guilty. This Court promulgated Rules 32–39 under authority of the Act of February 24, 1933, which authorized only rules governing proceedings in criminal cases after verdict, finding of guilty or not guilty by the court, or plea of guilty. 47 Stat. 904, as amended, 18 U. S. C. § 3772 (1964 ed.). See 327 U. S. 825. In 1940, Congress authorized the Court to prescribe rules for criminal proceedings prior to verdict, finding of guilty or not guilty by the court, or plea of

While the case was pending in that court, two events of critical significance took place. The first of these was the enactment into law by the United States Congress of the Civil Rights Act of 1964, 78 Stat. 241. The second was the decision of this Court in *Hamm* v. *City of Rock Hill*, 379 U. S. 306. That case held that the Act precludes state trespass prosecutions for peaceful attempts to be served upon an equal basis in establishments covered by the Act, even though the prosecutions were instituted prior to the Act's passage.[3] In view of these intervening developments in the law, the Court of Appeals reversed the District Court. In terms of the language of § 1443 (1), the court held that, if the allegations in the petition were true, prosecution in the courts of Georgia under that State's trespass statute, substantially similar to the state statutes involved in *Hamm*, denied the defendants a right under a law providing for equal civil rights—the Civil Rights Act of 1964. The case was therefore returned to the District Court, with directions that the defendants be given an opportunity to prove that their prosecutions had resulted from orders to leave public accommodations "for racial reasons." Upon such proof, the court held that *Hamm* would then require the District Court to order dismissal of the prosecutions. 342 F. 2d 336, 343.

We granted certiorari to consider the applicability of the removal statute to the circumstances of this case. 382 U. S. 808. No issues touching the constitutional

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guilty. 54 Stat. 688, as amended, 18 U. S. C. § 3771 (1964 ed.). But this authorization required that the rules be submitted to Congress before they could take effect. Only Rules 1–31 and 40–60 were so submitted. 327 U. S. 824.

[3] "The Supremacy Clause, Art. VI, cl. 2, requires this result where 'there is a clear collision' between state and federal law . . . ." *Hamm* v. *City of Rock Hill*, 379 U. S. 306, 311.

power of Congress are involved. We deal only with questions of statutory construction.[4]

The present statute is a direct descendant of a provision enacted as part of the Civil Rights Act of 1866. 14 Stat. 27. The subsection that is now § 1443 (1) was before this Court in a series of decisions beginning with *Strauder* v. *West Virginia*, 100 U. S. 303, and *Virginia* v. *Rives*, 100 U. S. 313, in 1880 and ending with *Kentucky* v. *Powers*, 201 U. S. 1, in 1906.[5] The Court has not considered the removal statute since then, one reason being that an order remanding a case sought to be removed under § 1443 was not appealable after the year 1887.[6] In § 901 of the Civil Rights Act of 1964, however, Congress specifically provided for appeals from remand orders in § 1443 cases, so as to give the federal reviewing courts

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[4] For a remarkably original and comprehensive discussion of the issues presented in this case and in *City of Greenwood* v. *Peacock*, *post*, see Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. Pa. L. Rev. 793 (1965).

[5] The intervening cases were: *Neal* v. *Delaware*, 103 U. S. 370; *Bush* v. *Kentucky*, 107 U. S. 110; *Gibson* v. *Mississippi*, 162 U. S. 565; *Smith* v. *Mississippi*, 162 U. S. 592; *Murray* v. *Louisiana*, 163 U. S. 101; *Williams* v. *Mississippi*, 170 U. S. 213. See also *Dubuclet* v. *Louisiana*, 103 U. S. 550; *Schmidt* v. *Cobb*, 119 U. S. 286.

[6] Prior to 1875, a remand order was regarded as a nonfinal order reviewable by mandamus, but not by appeal. *Railroad Co.* v. *Wiswall*, 23 Wall. 507. In 1875, Congress provided for review "by the Supreme Court on writ of error or appeal, as the case may be." 18 Stat. 472. Twelve years later, however, Congress closed off the appellate avenue in the following language: "and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." 24 Stat. 553. Compare *Gay* v. *Ruff*, 292 U. S. 25, 28–31. In the case of *In re Pennsylvania Co.*, 137 U. S. 451, this Court held that the 1887 statute was also intended to bar review by mandamus. Until its amendment in 1964, the modern version of the statutory bar, 28 U. S. C. § 1447 (d), prohibited review of a remand order "on appeal or otherwise" in cases removed pursuant to any statute.

a new opportunity to consider the meaning and scope of the removal statute.[1] 78 Stat. 266, 28 U. S. C. § 1447 (d) (1964 ed.). The courts of appeals in four circuits have

[1] Section 901 of the Civil Rights Act of 1964 established an exception to the nonreviewability rule of 28 U. S. C. § 1447 (d) for cases removed pursuant to 28 U. S. C. § 1443, by making remand orders in these cases "reviewable by appeal or otherwise." 28 U. S. C. § 1447 (d) (1964 ed.). We have no doubt that Congress thereby intended to open the way for immediate appeal. See the remarks of: Representative Kastenmeier, 110 Cong. Rec. 2770; Senator Humphrey, 110 Cong. Rec. 6551; Senator Kuchel, 110 Cong. Rec. 6564; Senator Dodd, 110 Cong. Rec. 6955–6956.

Mr. Kastenmeier had originally introduced a bill amending § 1443 itself, which he described as making it "easier to remove a case from a State court to a U. S. district court, whenever it appears that strict impartiality is not possible in the State court." 109 Cong. Rec. 13126, 13128. In later defending the final bill which simply made remand orders appealable in § 1443 cases, he said on the House floor: "Mr. Chairman, what we have done is probably the most modest thing possible in this field. The subcommittee had before it a slightly more ambitious section dealing with this problem, and would have amended 1443 and 1447, but the committee took the most conservative approach and provided merely for an appeal of the remand decision." 110 Cong. Rec., at 2773.

The statements of the leaders speaking for the bill on the floor of the Senate are typified by the following remarks of Senator Dodd:

"Some have thought that it would be better for Congress to specify directly the kinds of cases which it thinks ought to be removable, rather than simply permitting appeals and allowing the courts to consider the statute again in light of the original intention of the Congress in 1866. It seems to me, however, that the course we have chosen is more appropriate, considering the rather technical nature of the statute with which we are dealing.

"It would be extremely difficult to specify with precision the kinds of cases which ought to be removable under section 1443. This is true because of the many and varied circumstances which can and do arise in civil rights matters. Accordingly, it seems advisable to allow the courts to deal case by case with situations as they arise, and to fashion the remedy so as to harmonize it with the other statutory remedies made available for denials of equal civil rights." 110 Cong. Rec., at 6956.

now had occasion to give extensive consideration to various aspects of the removal statute.[8] In the case before us, the Court of Appeals for the Fifth Circuit dealt only with issues arising under the first subsection of § 1443, and we confine our review to those issues.

Section 1443 (1) entitles the defendants to remove these prosecutions to the federal court only if they meet both requirements of that subsection. They must show both that the right upon which they rely is a "right under any law providing for . . . equal civil rights," and that they are "denied or cannot enforce" that right in the courts of Georgia.

The statutory phrase "any law providing for . . . equal civil rights" did not appear in the original removal provision in the Civil Rights Act of 1866. That provision allowed removal only in cases involving the express statutory rights of racial equality guaranteed in the Act itself. The first section of the 1866 Act secured for all citizens the "same" rights as were "enjoyed by white citizens" in a variety of fundamental areas.[9] Section 3,

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[8] In addition to this case and *City of Greenwood* v. *Peacock*, *post*, p. —, from the Fifth Circuit, see *Baines* v. *City of Danville*, 357 F. 2d 756 (C. A. 4th Cir.); *City of Chester* v. *Anderson*, 347 F. 2d 823 (C. A. 3d Cir.); *New York* v. *Galamison*, 342 F. 2d 255 (C. A. 2d Cir.).

The statistics on the number of criminal cases of all kinds removed from state to federal courts in recent years are revealing. For the fiscal years 1962, 1963, 1964, and 1965, there were 18, 14, 43, and 1,192 such cases respectively. Of the total removed criminal cases for 1965, 1,079 were in the Fifth Circuit. See Annual Report of the Director of the Administrative Office of the United States Courts 213–217 (1965).

[9] Section 1 of the Civil Rights Act of 1866 provided in relevant part:

"All . . . citizens of the United States . . . of every race and color, without regard to any previous condition of slavery or involuntary servitude . . . shall have the same right . . . to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase,

the removal section of the 1866 Act, provided for removal by "persons who are denied or cannot enforce . . . the rights secured to them by the first section of this act . . . ." [10]

The present language "any law providing for . . . equal civil rights" first appeared in § 641 of the Revised Statutes of 1875.[11] When the Revised Statutes were compiled, the substantive and removal provisions of the Civil Rights Act of 1866 were carried forward in separate sections.[12] Hence, Congress could no longer identify the rights for which removal was available by using the language of the original Civil Rights Act—"rights secured to them by the first section of this act." The new language it chose, however, does not suggest that it intended to limit the scope of removal to rights recognized in statutes existing in 1875. On the contrary, Congress' choice of the open-ended phrase "any law providing for . . . equal civil rights" was clearly appropriate to permit removal in cases involving "a right under" both existing and future statutes that provided for equal civil rights.

There is no substantial indication, however, that the general language of § 641 of the Revised Statutes was intended to expand the kinds of "law" to which the re-

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lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of person and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding." 14 Stat. 27.

[10] The relevant provisions of § 3 of the Civil Rights Act of 1866, 14 Stat. 27, are included in the Appendix to this opinion.

[11] The relevant provisions of § 641 of the Revised Statutes of 1875 are included in the Appendix to this opinion.

[12] The guarantees of § 1 of the Civil Rights Act of 1866 were carried forward as §§ 1977 and 1988 of the Revised Statutes, now 42 U. S. C. §§ 1981 and 1982.

moval section referred. In spite of the potential breadth of the phrase "any law providing for . . . equal civil rights," it seems clear that in enacting § 641, Congress intended in that phrase only to include laws comparable in nature to the Civil Rights Act of 1866. Prior to the 1875 revision, Congress had not significantly enlarged the opportunity for removal available to private persons beyond the relatively narrow category of rights specified in the 1866 Act, even though the Fourteenth and Fifteenth Amendments had been adopted and Congress had broadly implemented them in other major civil rights legislation.[13] Moreover, § 641 contained an explicit cross-reference at the end of the section to § 1977 of the Revised Statutes, which carried forward the principal rights created in § 1 of the 1866 Act. In addition, the note in the margin of § 641 pointed specifically to the removal provision of the Civil Rights Act of 1866 and to §§ 16 and 18 of the Civil Rights Act of 1870.[14] The latter sec-

[13] See, *e. g.*, Second Civil Rights Act, Act of May 31, 1870, 16 Stat. 140, as amended by Act of February 28, 1871, 16 Stat. 433; Third Civil Rights Act, Act of April 20, 1871, 17 Stat. 13. Section 1 of the Civil Rights Act of 1871, now 42 U. S. C. § 1983, established civil remedies for "the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States." When in 1875 the revisers relocated § 1 of the 1871 Act as § 1979 of the Revised Statutes, they expanded the section to include the deprivation of rights, privileges, and immunities secured by the "Constitution and laws" of the United States, in contrast to their reference merely to "law" in § 641 of the Revised Statutes, the civil rights removal provision. At least in some circumstances, therefore, it appears that the Revised Statutes may have specifically distinguished between "rights secured by the Constitution" and "rights secured by any law providing for equal civil rights." See also Revised Statutes § 629, Sixteenth (1875), which drew an explicit distinction between rights secured by the Constitution and rights secured by the laws of the United States. The marginal note to the latter section refers to "rights secured by the Constitution and laws" of the United States.

[14] See *Slaughter-House Cases*, 16 Wall. 36, 83, 96–97 (dissenting opinion of Field, J.).

tions were concerned solely with the re-enactment, in somewhat expanded form, of the 1866 Act. Finally, the limitation of § 641 to laws comparable to the Civil Rights Act of 1866 comports with the relatively narrow mandate of the revising commissioners "to revise, simplify, arrange, and consolidate all statutes of the United States, general and permanent in their nature, which shall be in force at the time such commissioners may make the final report of their doings." Act of June 27, 1866, c. 140, 14 Stat. 74. We conclude, therefore, that the model for the phrase "any law providing for . . . equal civil rights" in § 641 was the Civil Rights Act of 1866.

The legislative history of the 1866 Act clearly indicates that Congress intended to protect a limited category of rights, specifically defined in terms of racial equality. As originally proposed in the Senate, § 1 of the bill that became the 1866 Act did not contain the phrase "as is enjoyed by white citizens." [15] That phrase was later added in committee in the House, apparently to emphasize the racial character of the rights being protected. More important, the Senate bill did contain a general provision forbidding "discrimination in civil rights or immunities," preceding the specific enumeration of rights to be included in § 1.[16] Objections were raised in the legislative debates to the breadth of the rights of racial equality that might be encompassed by a prohibition so general as one against "discrimination in civil rights or immunities." There was sharp controversy in the Senate,[17] but the bill passed. After similar controversy in the House,[18]

[15] Cong. Globe, 39th Cong., 1st Sess., p. 474.

[16] *Ibid.*

[17] See, *e. g.*, *id.*, at 476–477 (remarks of Senator Saulsbury); 505–506 (remarks of Senator Johnson).

[18] See, *e. g.*, *id.*, at 1121–1122 (remarks of Representative Rogers); 1157 (remarks of Representative Thornton); 1271–1272 (remarks of Representative Bingham).

however, an amendment was accepted striking the phrase from the bill.[19]

On the basis of the historical material that is available, we conclude that the phrase "any law providing for . . . equal civil rights" must be construed to mean any law providing for specific civil rights stated in terms of racial equality. Thus, the defendants' broad contentions under the First Amendment and the Due Process Clause of the Fourteenth Amendment cannot support a valid claim for removal under § 1443, because the guarantees of those clauses are phrased in terms of general application available to all persons or citizens, rather than in the specific language of racial equality that § 1443 demands. As the Court of Appeals for the Second Circuit has concluded, § 1443 "applies only to rights that are granted in terms of equality and not to the whole gamut of constitutional rights . . . ." "When the removal statute speaks of 'any law providing for equal rights,' it refers to those laws that are couched in terms of equality, such as the historic and the recent civil rights statutes, as distinguished from laws, of which the Due Process Clause and 42 U. S. C. § 1983 are sufficient examples, that confer equal rights in the sense, vital to our way of life, of bestowing them upon all." *New York* v. *Galamison*, 342 F. 2d 255, 269, 271. See also *Gibson* v. *Mississippi*, 162 U. S. 565, 585–586; *Kentucky* v. *Powers*, 201 U. S. 1, 39–40; *City of Greenwood* v. *Peacock*, *post*, pp. 15–16.

But the defendants in the present case did not rely solely on these broad constitutional claims in their removal petition. They also made allegations calling into play the Civil Rights Act of 1964. That Act is clearly a law conferring a specific right of racial equality, for in

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[19] See Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 11–29 (1955).

§ 201 (a) it guarantees to all the "full and equal enjoyment" of the facilities of any place of public accommodation without discrimination on the ground of race." [20] By that language the Act plainly qualifies as a "law providing for . . . equal civil rights" within the meaning of 28 U. S. C. § 1443 (1).

Moreover, it is clear that the right relied upon as the basis for removal is a "right under" a law providing for equal civil rights. The removal petition may fairly be read to allege that the defendants will be brought to trial solely as the result of peaceful attempts to obtain service at places of public accommodation.[21] The Civil Rights Act of 1964 endows the defendants with a right not to be prosecuted for such conduct. As noted, § 201 (a) guarantees to the defendants the equal access they sought. Section 203 then provides that, "No person shall . . . (c) punish or *attempt to punish* any person for exercising or attempting to exercise any right or privilege secured by section 201 or 202." (Emphasis supplied.) 78 Stat. 244. In *Hamm* v. *City of Rock Hill*, 379 U. S. 306, 311, the Court held that this section of the Act "prohibits prosecution of any person for seeking service in a covered establishment, because of his race

[20] Section 201 (a) provides:

"All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin."

[21] Section 1446 of Title 28 requires that a removal petition contain "a short and plain statement of the facts" that purportedly justify removal. The instant petition satisfies that requirement. Since the petition predated the enactment of the Public Accommodations Title of the Civil Rights Act of 1964, it could not have explicitly alleged coverage under that Act. It recites facts, however, that invoke application of that Act on appeal. See *United States* v. *Schooner Peggy*, 1 Cranch 103; *Hamm* v. *City of Rock Hill*, 379 U. S. 306; *Linkletter* v. *Walker*, 381 U. S. 618, 627.

or color." Hence, if the facts alleged in the petition are true, the defendants not only are immune from conviction under the Georgia trespass statute, but they have a "right under" the Civil Rights Act of 1964 not even to be brought to trial on these charges in the Georgia courts.

The question remaining, then, is whether within the meaning of § 1443 (1), the defendants are "denied or cannot enforce" that right "in the courts of" Georgia. That question can be answered only after consideration of the legislative and judicial history of this requirement.

When Congress adopted the first civil rights removal provisions in § 3 of the Civil Rights Act of 1866, it incorporated by reference the procedures for removal established in § 5 of the Habeas Corpus Suspension Act of 1863, 12 Stat. 756. The latter section, in turn, permitted removal either at the pre-trial stage of the proceedings in the state court or after final judgment in that court.[22] There can be no doubt that post-judgment removal was a practical remedy for civil rights defendants invoking either the "denied or cannot enforce enforce" clause or the "color of authority" clause of the 1866 removal provision, in order to vindicate rights that had actually been denied at the trial.[23] The scope of pre-trial removal, however, was unclear.[24]

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[22] The relevant provisions of § 5 of the Habeas Corpus Suspension Act of 1863, 12 Stat. 756, are included in the Appendix to this opinion. Section 5 of the 1863 Act was amended in certain respects by the Act of May 11, 1866, 14 Stat. 46.

[23] The "color of authority" clause of the Civil Rights Act of 1866 was limited to federal officers and those assisting them. See *City of Greenwood* v. *Peacock*, *post*, pp. 5–15. In addition, federal officers might also invoke the "denied or cannot enforce" clause.

[24] In view of the large numbers of federal officers and agents potentially involved in enforcement activities under the Civil Rights Act of 1866, see *City of Greenwood* v. *Peacock*, *post*, pp. 7–11, pre-trial removal would have been of obvious utility under the "color of authority" clause of § 3 of the Civil Rights Act of 1866. Cf. *Tennessee* v. *Davis*, 100 U. S. 257, 261–262 (removal under § 643 of

Congress eliminated post-judgment removal when it enacted § 641 of the Revised Statutes of 1875.[25] The compilation of the Revised Statutes coincided with the

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the Revised Statutes of 1875); *Hodgson* v. *Millward*, 12 Fed. Cas. 285 (No. 6568 (C. C. E. D. Pa.)) (removal under § 5 of the Habeas Corpus Suspension Act of 1863, 12 Stat. 756), approved in *Braun* v. *Sauerwein*, 10 Wall. 218, 224. No such obvious role for pre-trial removal is evident under the "denied or cannot enforce" clause.

The obscure legislative history of § 3 of the Civil Rights Act of 1866 indicates only that the Reconstruction Congress did not intend the language of the "denied or cannot enforce" clause of § 3 to be read to its fullest possible extent. In his veto message accompanying the bill President Johnson construed the clause so broadly as to give the federal courts jurisdiction over all cases affecting a person who was denied any of the various rights conferred by § 1, whether or not the right in question was in issue in the particular case. For example, in the President's view, a state court defendant under indictment for murder, who happened to be denied a contractual right under § 1, would be able to remove his case for trial in the federal court. In urging passage of the bill over the President's veto, Senator Trumbull, the floor manager of the bill, rejected the President's construction of the "denied or cannot enforce" clause:

"The President objects to the third section of the bill . . . . [H]e insists [that it] gives jurisdiction to all cases affecting persons discriminated against, as provided in the first and second sections of the bill; and by a strained construction the President seeks to divest State courts, not only of jurisdiction of the particular case where a party is discriminated against, but of all cases affecting him or which might affect him. This is not the meaning of the section. I have already shown, in commenting on the second section of the bill, that no person is liable to its penalties except the one who does an act which is made penal; that is, deprives another of some right that he is entitled to, or subjects him to some punishment that he ought not to bear.

"So in reference to this third section, the jurisdiction is given to the Federal courts of a case affecting the person that is discriminated against. Now, he is not necessarily discriminated against, because there may be a custom in the community discriminating against him, nor because a Legislature may have passed a statute discriminating against him; that statute is of no validity if it comes in conflict

[*Footnote 25 on p. 15*]

end of the Reconstruction period. During Reconstruction itself, removal under § 3 of the Civil Rights Act of 1866 had been but one measure established by Congress for the enforcement of the numerous statutory rights created under the Civil War Amendments. In other enactments, Congress had taken relatively more drastic steps to enforce those rights.[24] But by the end of the

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with a statute of the United States; and it is not to be presumed that any judge of a State court would hold that a statute of a State discriminating against a person on account of color was valid when there was a statute of the United States with which it was in direct conflict, and the case would not therefore rise in which a party was discriminated against until it was tested, and then if the discrimination was held valid he would have a right to remove it to a Federal court—or, if undertaking to enforce his right in a State court he was denied that right, then he could go into the Federal court; but it by no means follows that every person would have a right in the first instance to go to the Federal court because there was on the statute-book of the State a law discriminating against him, the presumption being that the judge of the court when he came to act upon the case, would, in obedience to the paramount law of the United States, hold the State statute to be invalid." Cong. Globe, 39th Cong., 1st Sess., p. 1759.

Cf. *Blyew* v. *United States*, 13 Wall. 581. It is clear that Senator Trumbull's reference to a person "discriminated against" was a reference to a person who is denied his rights under the bill within the meaning of the "denied or cannot enforce" clause of § 3. See Cong. Globe, 39th Cong., 1st Sess., p. 475.

[23] In 1870, this Court invalidated under the Seventh Amendment post-judgment removal with respect to civil cases tried to a jury. *The Justices* v. *Murray*, 9 Wall. 274. See also *McKee* v. *Rains*, 10 Wall. 22.

[24] See, *e. g.*, § 14 of the Amendatory Freedmen's Bureau Act of July 16, 1866, 14 Stat. 176, which re-enacted, in virtually identical terms for the unreconstructed Southern States, the rights granted in § 1 of the Civil Rights Act of 1866, and provided for the enforcement of those rights under the jurisdiction of military tribunals. See also § 1 of the Reconstruction Act of March 2, 1867, 14 Stat. 428, which divided the rebel States into five military districts and placed them under martial law.

Reconstruction period, many of these measures had expired, and by eliminating post-judgment removal, Congress had substantially truncated the original civil rights removal provision. Pre-trial removal was retained, but the scope of the provision had never been clarified. It was in this historic setting that the Court examined the scope of § 641. In a series of cases commencing with *Strauder* v. *West Virginia*, *supra*, and *Virginia* v. *Rives*, *supra*, decided on the same day in the 1879 Term, the Court established a relatively narrow, well-defined area in which pre-trial removal could be sustained under the "denied or cannot enforce" clause of that section.

In *Strauder*, the removal petition of a Negro indicted for murder pointed to a West Virigina statute that permitted only white male persons to serve on a grand or petit jury. Since Negroes were excluded from jury service pursuant to that statute, the defendant claimed that the "probabilities" were great that he would suffer a denial of his right to the "full and equal benefit of all laws and proceedings in the State of West Virginia. . . ." 100 U. S., at 304. The state court denied removal, however, and the defendant was convicted.[27]

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[27] In 1875, a petition for removal could be filed in the state court in which proceedings were pending. Rev. Stat. § 641. If the state court denied removal, that determination could be preserved for review by this Court on review of the final judgment of conviction. An alternative procedure was also available. A petition could be filed in the federal trial court to which the state court had denied removal. See *Virginia* v. *Rives*, 100 U. S. 303, 313; *Virginia* v. *Paul*, 148 U. S. 107, 116. In 1948, removal procedure was simplified. The petition is now filed in the first instance in the federal court. After notice is given to all adverse parties and a copy of the petition is filed with the state court, removal is effected and state court proceedings cease unless the case is remanded. 28 U. S. C. § 1446. See generally, American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Tentative Draft No. 4, pp. 153 ff. (April 25, 1966).

This Court held that pre-trial removal should have been granted because, in the language of § 641, it appeared even before trial that the defendant would be denied or could not enforce a right secured to him by a "law providing for . . . equal civil rights." The law specifically invoked by the Court was § 1977 of the Revised Statutes, now 42 U. S. C. § 1981. That law, the Court held, conferred upon the defendant the right to have his jurors selected without discrimination on the ground of race. Because of the direct conflict between the West Virginia statute and § 1977, the Court in *Strauder* held that the defendant would be the victim of "a denial by the statute law of the State." 100 U. S., at 312.

In *Virginia* v. *Rives*, however, the defendants could point to no such state statute as the basis for removal. Their petition alleged that strong community racial prejudice existed against them, that the grand and petit jurors summoned to try them were all white, that Negroes had never been allowed to serve on county juries in cases in which a Negro was involved in any way, and that the judge, the prosecutor, and the assistant prosecutor had all rejected their request that Negroes be included in the petit jury. Hence, the defendants maintained, they could not obtain a fair trial in the state court. But the only relevant Virginia statute to which the petition referred imposed jury duty on *all* males within a certain age range. Thus, the law of Virginia did not, on its face, sanction the discrimination of which the defendants complained. This Court held that the petition stated no ground for removal. Critical to its holding was the Court's observation that § 641 of the Revised Statutes authorized only pre-trial removal. The Court concluded:

> "the denial or inability to enforce in the judicial tribunals of a State, rights secured to a defendant by any law providing for . . . equal civil rights . . .

of which sect. 641 speaks, is primarily, if not exclusively, a denial of such rights, or an inability to enforce them, resulting from the Constitution or laws of the State, rather than a denial first made manifest at the trial of the case. In other words, the statute has reference to a legislative denial or an inability resulting from it. Many such cases of denial might have been apprehended, and some existed. Colored men might have been, as they had been, denied a trial by jury. They might have been excluded by law from any jury summoned to try persons of their race, or the law might have denied to them the testimony of colored men in their favor, or process for summoning witnesses. . . . In all such cases a defendant can affirm, on oath, before trial, that he is denied the equal protection of the laws or equality of civil rights. But in the absence of constitutional or legislative impediments he cannot swear before his case comes to trial that his enjoyment of all his civil rights is denied to him. When he has only an apprehension that such rights will be withheld from him when his case shall come to trial, he cannot affirm that they are actually denied, or that he cannot enforce them. Yet such an affirmation is essential to his right to remove his case. By the express requirement of the statute his petition must set forth the facts upon which he bases his claim to have his case removed, and not merely his belief that he cannot enforce his rights at a subsequent stage of the proceedings. The statute was not, therefore, intended as a corrective of errors or wrongs committed by judicial tribunals in the administration of the law at the trial." 100 U. S., at 319–320.

The Court acknowledged that even though Virginia's statute did not authorize discrimination in jury selection,

the officer in charge of the selection might nevertheless bring it about.

> "But when a subordinate officer of the State, in violation of State law, undertakes to deprive an accused party of a right which the statute law accords to him, as in the case at bar, it can hardly be said that he is denied, or cannot enforce, 'in the judicial tribunals of the State' the rights which belong to him. In such a case it ought to be presumed the court will redress the wrong." 100 U. S. 313, 321–322.

The Court distinguished the situation in *Strauder:*

> "It is to be observed that [§ 641] gives the right of removal only to a person 'who is denied, or cannot enforce, in *the judicial tribunals of the State* his equal civil rights.' And this is to appear before trial. When a statute of the State denies his right, or interposes a bar to his enforcing it, in the judicial tribunals, the presumption is fair that they will be controlled by it in their decisions; and in such a case a defendant may affirm on oath what is necessary for a removal. Such a case is clearly within the provisions of sect. 641." 100 U. S., at 321. (Emphasis in original.)

Strauder and *Rives* thus teach that removal is not warranted by an assertion that a denial of rights of equality may take place and go uncorrected at trial. Removal is warranted only if it can be predicted by reference to a law of general application that the defendant will be denied or cannot enforce the specified federal rights in the state courts. A state statute authorizing the denial affords an ample basis for such a prediction.

The doctrine announced in *Strauder* and *Rives* was amplified in *Neal* v. *Delaware*, 103 U. S. 370, and *Bush* v. *Kentucky*, 107 U. S. 110. In both cases, the Court reversed convictions on the ground that jury selection

had been conducted pursuant to a policy of racial discrimination. Yet in both cases the Court also held that a pre-trial removal petition alleging such discrimination stated no ground for removal. In *Neal* the petition relied upon a Delaware constitutional provision, adopted prior to the advent of the Fourteenth and Fifteenth Amendments, that purportedly sanctioned discriminatory jury selection. But the Delaware court in which the petition had been filed held that the subsequent Amendments rendered the state provision void. Hence, unlike *Strauder*, the *Neal* case involved no law of the State upon which to found a suitable prediction that rights of equality would be denied in the courts of the State. In *Bush*, the petition relied upon a Kentucky jury exclusion statute drawn along racial lines that had been enacted after the adoption of the Fourteenth Amendment. But prior to Bush's trial, the Kentucky Court of Appeals had held, in another case, that the statute was unconstitutional. This Court noted that the judicial declaration was binding upon all inferior Kentucky courts and concluded that, "After that decision, so long as it was unmodified, it could not have been properly said in advance of trial that the defendant in a criminal prosecution was denied or could not enforce in the judicial tribunals of Kentucky the rights secured to him by any law providing for . . . equal civil rights. . . ." 107 U. S., at 116. In both *Neal* and *Bush*, then, the Court held that in the absence of a presently effective state law authorizing the predicted denial, the state court was the proper forum for the resolution of the claims that rights of equality would be denied, even though, as the Court also held, the state courts had ultimately failed to correct the denials that in fact took place at the defendants' trials in those two cases.

Four subsequent decisions, also involving claims of racial discrimination in jury selection, reiterated the principles announced in *Strauder* and *Rives*, and amplified in *Neal* and *Bush*.[28] The final removal case decided by this Court was *Kentucky* v. *Powers*, 201 U. S. 1. In that case, which involved alleged discrimination on a political basis, the defendant was about to undergo his fourth trial, having been successful on appeal after three prior verdicts of guilty. He could therefore enhance his prediction that rights would be denied by pointing to instances of illegality in the three prior proceedings against him. But the petition for removal resembled those in the cases that followed *Strauder* in that it pointed to no state enactment that authorized the predicted denial. Accordingly, restating the *Strauder-Rives* doctrine, this Court held that no case for removal had been made out.

In the line of cases from *Strauder* to *Powers*, the Court interpreted § 641 of the Revised Statutes of 1875. That statute has come down to us, in modified form, as § 1443. But in its first subsection, the present removal statute still requires that a petitioner be one who "is denied or cannot enforce in the courts of" a State the rights he seeks to vindicate by removing the case to federal court. There is no suggestion that the modifications in the statute since 1875 were intended to effect any change in substance. Hence, for the purposes of the present case, we are dealing with the same statute that confronted the Court in the cases interpreting § 641.[29]

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[28] *Gibson* v. *Mississippi*, 162 U. S. 565; *Smith* v. *Mississippi*, 162 U. S. 592; *Murray* v. *Louisiana*, 163 U. S. 101; *Williams* v. *Mississippi*, 170 U. S. 213. See also *Dubuclet* v. *Louisiana*, 103 U. S. 550; *Schmidt* v. *Cobb*, 119 U. S. 286.

[29] Since *Kentucky* v. *Powers*, 201 U. S. 1, the federal courts have consistently applied the *Strauder-Rives* doctrine to deny removal in a variety of circumstances. See, *e. g.*, *Kentucky* v. *Wendling*, 182 F. 140 (C. C. W. D. Ky.); *White* v. *Keown*, 261 F. 814 (D. C. D. Mass.); *Ohio* v. *Swift & Co.*, 270 F. 141 (C. A. 6th Cir.); *New*

The *Strauder-Rives* doctrine, as consistently applied in all these cases, required a removal petition to allege, not merely that rights of equality would be denied or could not be enforced, but that the denial would take place in the courts of the State. The doctrine also required that the denial be manifest in a formal expression of state law. This requirement served two ends. It ensured that removal would be available only in cases where the predicted denial appeared with relative clarity prior to trial. It also ensured that the task of prediction would not involve a detailed analysis by a federal judge of the likely disposition of particular federal claims by particular state courts. That task not only would have been difficult, but it also would have involved federal judges in the unseemly process of pre-judging their brethren of the state courts. Thus, the Court in *Strauder* and *Rives* concluded that a state enactment, discriminatory on its face, so clearly authorized discrimination that

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Jersey v. *Weinberger*, 38 F. 2d 298 (D. C. D. N. J.); *Snypp* v. *Ohio*, 70 F. 2d 535 (C. A. 6th Cir.); *Hull* v. *Jackson County Circuit Court*, 138 F. 2d 820 (C. A. 6th Cir.); *Steele* v. *Superior Court*, 164 F. 2d 781 (C. A. 9th Cir.); *Lamson* v. *Superior Court*, 12 F. Supp. 812 (D. C. N. D. Cal.); *California* v. *Lamson*, 12 F. Supp. 813 (D. C. N. D. Cal.); *Washington* v. *American Society of Composers*, 13 F. Supp. 141 (D. C. W. D. Wash.); *Bennett* v. *Roberts*, 31 F. Supp. 825 (D. C. W. D. N. Y.); *North Carolina* v. *Jackson*, 135 F. Supp. 682 (D. C. M. D. N. C.); *Texas* v. *Dorris*, 165 F. Supp. 738 (D. C. S. D. Tex.); *Louisiana* v. *Murphy*, 173 F. Supp. 782 (D. C. W. D. La.); *McDonald* v. *Oregon*, 180 F. Supp. 861 (D. C. D. Ore.); *Hill* v. *Pennsylvania*, 183 F. Supp. 126 (D. C. W. D. Pa.); *Rand* v. *Arkansas*, 191 F. Supp. 20 (D. C. W. D. Ark.); Petition of Hagewood, 200 F. Supp. 140 (D. C. E. D. Mich.); *Van Newkirk* v. *District Attorney*, 213 F. Supp. 61 (D. C. E. D. N. Y.); *City of Birmingham* v. *Croskey*, 217 F. Supp. 947 (D. C. N. D. Ala.); *Arkansas* v. *Howard*, 218 F. Supp. 626 (D. C. E. D. Ark.); *Alabama* v. *Robinson*, 220 F. Supp. 293 (D. C. N. D. Ala.); *Levitt & Sons Inc.* v. *Prince George County Congress of Racial Equality*, 221 F. Supp. 541 (D. C. D. Md.); *Olsen* v. *Doerfler*, 225 F. Supp. 540 (D. C. E. D. Mich.).

it could be taken as a suitable indication that all courts in that State would disregard the federal right of equality with which the state enactment was precisely in conflict.

In *Rives* itself, however, the Court noted that the denial of which the removal provision speaks "is primarily, *if not exclusively*, a denial . . . resulting from the Constitution or laws of the State . . . ." 100 U. S., at 319. (Emphasis supplied.) This statement was reaffirmed in *Gibson* v. *Mississippi*, 162 U. S. 565, 581. The Court thereby gave some indication that removal might be justified, even in the absence of a discriminatory state enactment, if an equivalent basis could be shown for an equally firm prediction that the defendant would be "denied or cannot enforce" the specified federal rights in the state court. Such a basis for prediction exists in the present case.

In the narrow circumstances of this case, *any* proceedings in the courts of the State will constitute a denial of the rights conferred by the Civil Rights Act of 1964, as construed in *Hamm* v. *City of Rock Hill*, if the allegations of the removal petition are true. The removal petition alleges, in effect, that the defendants refused to leave facilities of public accommodation, when ordered to do so solely for racial reasons, and that they are charged under a Georgia trespass statute that makes it a criminal offense to refuse to obey such an order. The Civil Rights Act of 1964, however, as *Hamm* v. *City of Rock Hill*, 379 U. S. 306, made clear, protects those who refuse to obey such an order not only from conviction in state courts, but from *prosecution* in those courts. *Hamm* emphasized the precise terms of § 203 (c) that prohibit any "attempt to punish" persons for exercising rights of equality conferred upon them by the Act. The explicit terms of that section compelled the conclusion that "nonforcible attempts to gain admittance to or remain in establishments covered by the Act, are immunized from prosecution . . . ." 379 U. S., at 311.

The 1964 Act therefore "substitutes a right for a crime." 379 U. S., at 314. Hence, if as alleged in the present removal petition, the defendants were asked to leave solely for racial reasons, then the mere pendency of the prosecutions enables the federal court to make the clear prediction that the defendants will be "denied or cannot enforce in the courts of [the] State" the right to be free of any "attempt to punish" them for protected activity. It is no answer in these circumstances that the defendants might eventually prevail in the state court.[30] The burden of having to defend the prosecutions is itself the denial of a right explicitly conferred by the Civil Rights Act of 1964 as construed in *Hamm* v. *City of Rock Hill, supra.*

Since the Federal District Court remanded the present case without a hearing, the defendants as yet have had no opportunity to establish that they were ordered to leave the restaurant facilities solely for racial reasons. If the Federal District Court finds that allegation true, the defendants' right to removal under § 1443 (1) will be clear.[31] The *Strauder-Rives* doctrine requires no more, for the denial in the courts of the State then clearly appears without any detailed analysis of the likely behavior of any particular state court. Upon such a finding it will be apparent that the conduct of the defendants is "immunized from prosecution" in any court, and the Federal District Court must then sustain the removal and dismiss the prosecutions.

For these reasons, the judgment is *Affirmed.*

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[30] As pointed out in the separate opinion of Judge Bell in the Court of Appeals for the Fifth Circuit, 342 F. 2d 336, 343, 345, the Supreme Court of Georgia has in at least one case applied the doctrine of *Hamm* v. *City of Rock Hill* to set aside convictions under the state trespass statute. *Bolton* v. *Georgia*, 220 Ga. 632, 140 S. E. 2d 866.

[31] In addition to their racial allegation, the defendants must also show that the restaurant facilities in question were establishments covered by the Civil Rights Act of 1964.

GEORGIA *v.* RACHEL ET AL.—APPENDIX TO OPINION OF THE COURT.

Comparative Table of Civil Rights Removal Legislation.

Habeas Corpus Suspension Act Act of March 3, 1863, c. 81, § 5, 12 Stat. 755, 756	Civil Rights Act of 1866 Act of April 9, 1866, c. 31, § 3, 14 Stat. 27	Revised Statutes of 1875 § 641	Title 28, United States Code § 1443 (1964 ed.)
	SEC. 3. *And be it further enacted*, That the district courts of the United States, within their respective districts, shall have, exclusively of the courts of the several States, cognizance of all crimes and offences committed against the provisions of this act, and also, concurrently with the circuit courts of the United States, of all causes, civil and criminal, affecting persons who are denied or cannot enforce in the courts or judicial tribunals of the State or locality where they may be any of the rights secured to them by the first section of this act; [1] and if any suit or prosecution, civil or criminal, has been or shall be commenced in any State court, against any such person, for any cause whatsoever,	SEC. 641. When any civil suit or criminal prosecution is commenced in any State court, for any cause whatsoever, against any person who is denied or cannot enforce in the judicial tribunals of the State, or in the part of the State where such suit or prosecution is pending, any right secured to him by any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction of the United States,	§ 1443. *Civil rights cases.* Any of the following civil actions or criminal prosecutions, commenced in a State court may be removed by the defendant to the district court of the United States for the district and division embracing the place wherein it is pending: (1) Against any person who is denied or cannot enforce in the courts of such State a right under any law providing for the equal civil rights of citizens of the United States, or of all persons within the jurisdiction thereof;
SEC. 5. *And be it further enacted*, That if any suit or prosecution, civil or criminal, has been or shall be commenced in any state court against any officer, civil or military, or against any other person, for any arrest or imprisonment made, or other trespasses or wrongs done or committed, or any act omitted to be done, at any time during the present rebellion, by virtue or under color of any authority derived from or exercised by or under the President of the United States, or any act of Congress, and the defendant shall, at the time of entering his appearance in such court, or if such appearance shall have been entered before the passage of this act, then at the next session of the court in which such suit or prosecution is pending, file a petition, stating the facts and verified by affidavit, for the removal of the cause for trial at the next circuit court of the United States, to be holden in the district where the suit is pending . . . . [T]he cause shall proceed therein in the same manner as if it had been brought in said court by original process . . . . And it shall be lawful in any such action or prosecution which may be now pending, or hereafter commenced, before any state court whatever, for any cause aforesaid, after final judgment, for either party to remove and transfer, by appeal, such case during the session or term of said court at which the same shall have taken place, from such court to the next circuit court of the United States to be held in the district in which such appeal shall be taken . . . . [A]nd it shall also be competent for either party, within six months after the rendition of a judgment in any such cause, by writ of error or other process, to remove the same to the circuit court of the United States of that district in which such judgment shall have been rendered . . . . *Provided* . . . That no such appeal or writ of error shall be allowed in any criminal action or prosecution where final judgment shall have been rendered in favor of the defendant or respondent by the state court. . . .	or against any officer, civil or military, or other person, for any arrest or imprisonment, trespasses, or wrongs done or committed by virtue or under color of authority derived from this act or the act establishing a Bureau for the relief of Freedmen and Refugees, and all acts amendatory thereof, or for refusing to do any act upon the ground that it would be inconsistent with this act, such defendant shall have the right to remove such cause for trial to the proper district or circuit court in the manner prescribed by the "Act relating to habeas corpus and regulating judicial proceedings in certain cases," approved March three, eighteen hundred and sixty-three, and all acts amendatory thereof. . . .	or against any officer, civil or military, or other person, for any arrest, or imprisonment or other trespasses or wrongs, made or committed by virtue of or under color of authority derived from any law providing for equal rights as aforesaid, or for refusing to do any act on the ground that it would be inconsistent with such law, such suit or prosecution may, upon the petition of such defendant, filed in said State court, at any time before the trial or final hearing of the cause, stating the facts and verified by oath, be removed, for trial, into the next circuit court to be held in the district where it is pending. . . . [2]	(2) For any act under color of authority derived from any law providing for equal rights, or for refusing to do any act on the ground that it would be inconsistent with such law.

[1] Section 1 of the Civil Rights Act of 1866, 14 Stat. 27, is reproduced in note 9, *supra*.

[2] The provisions of § 641 of the Revised Statutes of 1875 were carried forward as § 31 in the compilation of the Judicial Code of 1911, c. 231, 36 Stat. 1096. Aside from insignificant changes in punctuation, the only alteration introduced in 1911 was the substitution of "district court" for "circuit court" in the section. Section 31 was carried forward without change as § 74 of Title 28 of the United States Code, as codified in 1926. Section 74 became § 1443 in the revision of Title 28 in 1948.

SUPREME COURT OF THE UNITED STATES

No. 147.—October Term, 1965.

State of Georgia, Petitioner, v. Thomas Rachel et al. | On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[June 20, 1966.]

Mr. Justice Douglas, with whom The Chief Justice, Mr. Justice Brennan and Mr. Justice Fortas join, concurring.

As I indicate in my opinion in the *Peacock* cases, *post*, at p. 8, equal civil rights of a citizen of the United States are "denied" within the meaning of 28 U. S. C. § 1443 (1) when he is prosecuted for asserting them. Section 201 of the Civil Rights Act of 1964 (78 Stat. 243, 42 U. S. C. § 2000a, 1964 ed.) gave these defendants a right to equal service in places of public accommodation. Section 203 (78 Stat. 244, 42 U. S. C. § 2000a–2, 1964 ed.) gave them a right against intimidation, coercion, or punishment for exercising those rights. And we held in *Hamm* v. *City of Rock Hill*, 379 U. S. 306, that §§ 201 and 203 precluded state criminal trespass convictions of sit-in demonstrators even though the sit-ins occurred and their prosecution had been instituted prior to the effective date of the 1964 Act.

Congress, in other words, gave these defendants the right to enter the restaurants in question, to sit there, and to be served—a right that was construed by this Court to include immunity from prosecution after the effective date of the Act for acts done prior thereto.

It is the right to equal service in restaurants and the right to be free of prosecution for asserting that right—not the right to have a trespass conviction reversed—that the present prosecutions threaten. It is this right which

must be vindicated by complete insulation from the State's criminal process if it is to be wholly vindicated. It is this right which the defendants are "denied" so long as the present prosecutions persist.

Georgia claims that *Hamm* v. *City of Rock Hill, supra*, does not cover cases of sit-ins prosecuted for disorderly conduct or other unlawful acts. Of course that is true. But one of the functions of the hearing on the allegations of the removal petition will be to determine whether the defendants were ejected on racial grounds or for some other, valid, reason. The Court of Appeals correctly ruled "that in the event it is established that the removal of the appellants from the various places of public accommodation was done *for racial reasons*, then under authority of the *Hamm* case it would become the duty of the district court to order a dismissal of the prosecutions without further proceedings." 342 F. 2d 336, 343. (Emphasis added.)

If service was denied for other reasons, no case for removal has been made out. And if, as is intimated, any doubt remains as to whether the restaurants in question were covered by the 1964 Act, that too should be left open in the hearing to be held before the District Court—a procedure to which the defendants do not object.